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In the

Supreme Court of the United States

October Term 1970

No. 1047

United States of America,

Respondent,

—against—

American Radiator & Standard Sanitary Corporation, Joseph J. Decker and Daniel J. Quinn,

Petitioners,

and

Kohler Co., Borg-Warner Corporation and Norman R. Heid,

Respondents.

PETITION OF AMERICAN STANDARD INC., JOSEPH J. DECKER AND DANIEL J. QUINN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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December 3, 1970

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In the

Supreme Court of the United States

October Term 1970

No.

United States of America,

Respondent

against

American Radiator & Standard Sanitary Corporation, Joseph J. Becker and Daniel J. Quinn,

Petitioners

and

Kohler Co., Borg-Warner Corporation and Norman R. Held,

Respondents

PETITION OF AMERICAN STANDARD INC., JOSEPH J. BECKER AND DANIEL J. QUINN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered on September 23, 1970.

The Opinions Below

Petitioners seek review of the judgments of the United States Court of Appeals for the Third Circuit, filed on September 23, 1970, affirming petitioners' convictions after

a jury trial. The opinion of the Court of Appeals (Seitz, Aldisert, C.J.J. and Higginbotham, D.J.), although not yet officially reported, is reported at 1970 Trade Cas. ¶ 73,331, and is printed as Appendix D to this petition. The Order of the Court of Appeals denying petitioners' motions for rehearing was filed on November 3, 1970 and is printed as Appendix E to this petition.

The judgments of conviction of the District Court are unreported and are printed as Appendices A, B and C, respectively, to this petition.*

Jurisdiction

The judgment of the Court of Appeals was rendered on September 23, 1970, affirming petitioners' convictions dated August 12, 1969. Petitions for rehearing were denied on November 3, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of this Court.

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* Earlier reported opinions in the case include the following: 272 F.Supp. 691 (W.D. Pa. 1967) [motion to enjoin civil proceedings], reversed in 388 F.2d 201 (3rd Cir. 1967), cert. denied 390 U.S. 922; 274 F.Supp. 790 (W.D. Pa. 1967) [motion to dismiss and suppress evidence]; 278 F.Supp. 241 (W.D. Pa. 1967) [motion to dismiss and suppress evidence]; 278 F. Supp. 608 (W.D. Pa. 1967) [motion to dismiss]; 288 F.Supp. 696 (W.D. Pa. 1968) [motions to withdraw not guilty pleas and to enter nolo contendere]; 288 F.Supp. 701 (W.D. Pa. 1968) [motion to suppress evidence].

Questions Presented*

1. Is a defendant's right to confrontation of the witnesses against him denied by the (a) introduction of out-of-court declarations by available declarants who are not called to testify, (b) application of the co-conspirators exception to the hearsay rule and/or (c) introduction of out-of-court declarations by declarants who are called to testify but who do not affirm the declarations?

2. Does the Confrontation Clause require the government to produce grand jury testimony of declarants whose incriminating out-of-court statements are introduced at trial and who are not called as witnesses?

3. Does *Brady* v. *Maryland* require the production of statements in the government's possession which may be useful to the defense on some issues although not clearly exculpatory as a whole?

4. Are documents which satisfy the "regular course of business" requirements of 28 U.S.C. § 1732(a) admissible as business records if they contain hearsay and opinion statements concerning a competitor's pricing and market actions?

5. Is a defendant deprived of a fair trial by (a) the erroneous exclusion of documentary evidence corroborating his testimony and constituting circumstantial evidence of

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* Petitioners respectfully refer to and rely upon the Questions Presented in the separate petitions of Kohler Co., Borg-Warner Corporation, and Norman R. Held for questions equally applicable to the petitioners herein.

innocence and (b) a subsequent jury instruction questioning the probative value of exculpatory testimony by a defendant and/or a corporate defendant's employees?

6. Does an appellate court's focus solely on the government's evidence, rather than on all the evidence, preclude a proper determination of the impact of error under the *Chapman* standard?

7. Does a criminal defendant's right to proof of guilt beyond a reasonable doubt require appellate courts to apply the *Chapman* "beyond a reasonable doubt" standard to all error in criminal cases?

Constitutional Provisions and Statutes Involved

The statute pursuant to which petitioners were convicted is Section 1 of Title 15 of the United States Code. The constitutional provisions and statutes involved are Amendments V and VI to the Constitution of the United States and the Business Records Act, 28 U.S.C. § 1732. The relevant constitutional *provisions and statutes are set forth* in Appendix F to this petition.

Statement of the Case

The one-count indictment charges that, during the period from September 1962 through sometime in 1966, petitioners and others* conspired to "raise, fix, stabilize and main-

* In addition to the defendants at trial, five corporate defendants, five individual defendants and a trade association were sentenced in 1968 on pleas of *nolo contendere*. (J.A. 2a-5a)

tain the prices of enameled cast iron and vitreous china plumbing fixtures" in violation of Section 1 of the Sherman Antitrust Act. (J.A. 15a*)

Petitioner American Standard Inc. ("American-Standard")** is the largest manufacturer of plumbing fixtures in the United States. (T. 8243) Petitioner Joseph J. Decker was president of American-Standard's Plumbing and Heating Division, and petitioner Daniel J. Quinn, retired since 1965, formerly was vice-president of sales and marketing for the Plumbing and Heating Division. (E. 164)

Petitioners, together with Kohler Co., Borg-Warner Corporation and Norman R. Held who are filing companion petitions for writs of certiorari, were tried jointly and the jury returned verdicts of guilty against each defendant. The trial court imposed the maximum fines on the corporations and heavy fines and jail sentences on the individuals.

The Government's Case

At trial, the Government sought to prove what the Court of Appeals characterized as a "four-phased" price-fixing conspiracy among the indicted plumbing fixture manufacturers: (1) an agreement to raise published prices approximately 6% on two bathtub models in October-November 1962; (2) an agreement to maintain and to raise approximately 7% published prices for vitreous china plumbing fixtures in February 1963; (3) an agreement to

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* Record references are to pages in the "Joint Appendix", *e.g.*, "J.A. ——", or to the trial transcript, *e.g.*, "T. ——", or to the grand jury transcript, *e.g.*, "G.J.T. ——". Exhibit references are to pages in the "Exhibits to Joint Appendix", *e.g.*, "E. ——".

** Since the return of the indictment, the corporate name of "American Radiator & Standard Sanitary Corporation" was changed to "American Standard Inc."

limit maximum discounts from published prices on plumbing fixtures; and (4) an agreement to discontinue the production of the lower priced and inferior regular enameled cast iron fixtures and to increase the published prices for acid resisting plumbing fixtures in July 1963. (13a-18a*)

The trial court permitted the jury to convict any defendant found to have participated in any one "phase" of the conspiracy charged. The Court of Appeals concluded that there was sufficient evidence to go to the jury on all four "phases" against all defendants, except petitioner Decker as to whom the Court below found sufficient evidence of participation only as to the fourth "phase". (28a)

The principal elements of the Government's case were (a) the substantial identity of published (although not actual transaction) prices to wholesalers for certain high volume plumbing fixtures; (b) testimony from alleged co-conspirators concerning comments on prices by one or more individuals during the course of informal gatherings of employees of the indicted corporations; and (c) six pages of undated and unsigned handwritten notes ("IAC A notes") allegedly made by a non-indicted co-conspirator during a claimed conspiratorial gathering in March 1963, recording the price agreements charged in the fourth "phase".

Many of the informal gatherings were cocktail parties preceding or following out-of-town trade association meetings where the attendees arrived and left at various times and conversed informally in small constantly changing groups. (*E.g.*, J.A. 80a-81a, 91a, 128a, 206a; T. 6635-36) The prosecution witnesses' testimony concerning the at-

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* Reference to the opinion of the Court below are to the pages of the opinion reproduced in Appendix D to this petition.

testimony and discussion at the gatherings was inconsistent and equivocal. To the extent their testimony was incriminating, it consisted of the impressions and opinions formed by the witnesses after the gatherings that changes in published prices would be instituted. (*E.g.*, J.A. 81a-83a, 89a-105a, 173a-175a, 213a-214a, 281a-282a, 358a-362a, 385a-387a, 437a-439a.)

Petitioners' Defense

Petitioners attempted to counter the Government testimony concerning the gatherings through cross-examination of the prosecution witnesses and through the testimony of Becker and Quinn, as well as their co-defendant Held, each of whom denied any price fixing agreement or arrangement and testified as to non-conspiratorial explanations for his conduct and pricing decisions.*

Petitioners also called other American Standard employees to corroborate the individual petitioners' testimony as to the non-conspiratorial reasons for its marketing and pricing decisions and conduct during the indictment period both through their own testimony and through the introduction of contemporaneous documents from American Standard's files. (*E.g.*, J.A. 253a-47a, 318a, 320a; E. 250-295.) Petitioners inherently benefited also from the evidence presented by their co-defendants Held and Kohler (the

* Realistically, no other avenues for direct evidence countering the prosecution testimony were open to defendants. All alleged co-conspirator-attendees of the gatherings, other than defendants, were either indicted and pleaded *nolo contendere*, or were employees of indicted corporations which pleaded *nolo contendere*. (J.A. 2a-5a; E. 164.) With respect to the latter, all testified for the Government, except Raymond Pape, the purported author of the HCA notes. (*See, infra* at 9-10.)

second largest plumbing fixture manufacturer), particularly as to evidence of non-conspiratorial market behavior and the testimony of Dr. Theodore Beckman, a noted economist, as to market behavior negating conspiracy. (*E.g.*, J.A. 333a-48a, 360a-68a)

Specifically, petitioners offered evidence showing that (a) the October-November 1962 price increase was opposed by both Decker (who the Government evidence did not connect to the alleged agreement (17a)) and Quinn, but was ordered by American-Standard's corporate president (who was not alleged to be a conspirator) over their opposition (J.A. 132a-48a); (b) the February 1963 vitreous china price increase initiated by Crane Co. had been ordered by Crane's president (who was not alleged to be a conspirator) (J.A. 194a-99a) and was only partially followed by American-Standard pursuant to the recommendation of subordinates of Decker and Quinn (J.A. 253a-57a); (c) those responsible for American-Standard's discounting were never advised of any agreement on limiting discounts and American-Standard continued to discount below the alleged "agreement" levels throughout the indictment period (J.A. 330a-39a; T. 5575-78, 6025-32, 6145-47); and (d) the discontinuance of regular enamel fixtures resulted from independent business factors and the new acid-resistant enamel fixture prices actually constituted a price reduction (J.A. 414a-419a).

Reasons for Allowance of the Writ

In addition to the reasons presented below the petitioners also respectfully refer the Court to the reasons presented in the separate petitions of Kohler Co., Borg Warner Corporation, and Norman B. Held. Petitioners adopt but do not repeat the reasons presented in those petitions.

I.

This Court should clarify the limitations imposed by the Confrontation Clause on the use of incriminating out-of-court declarations of co-conspirators in a multi-defendant conspiracy trial.

Among others, this petition directly raises three issues adverted to, but not decided, by this Court in previous decisions construing the Confrontation Clause: (1) whether, since the Confrontation Clause is not coextensive with the hearsay rule, confrontation may be denied by non-hearsay, as well as hearsay, evidence; (2) whether confrontation is denied by the co-conspirator's exception to the hearsay rule; (3) whether the declarant's lack of recollection on cross-examination of his previously introduced out-of-court declaration denies confrontation. This Court should take the opportunity presented by this petition to define the limitations upon the prosecution's method of proof in a conspiracy trial prescribed by a defendant's right to confront the witnesses against him.

I. The right of confrontation should be clearly differentiated from the evidentiary rule excluding hearsay.

The 11(C)A notes (*supra* at 6), constituted the critical Government evidence as to the conspiracy's "fourth phase" and their mode of introduction, and subsequent use by the Government, graphically illustrates prejudice to petitioners from the denial of confrontation in this case.

In essence, the Government contended that the notes were: (1) written by Raymond Pape (a man inducted co-conspirator and a grand jury witness); (2) during a conspiratorial meeting attended by all defendants and their co-conspirators; (3) recording American Standard's proposed new acid resistant fixture prices disclosed by Quinn, and agreed to by all attendees; (4) prior to the institution of that price change. The Government told the jury that the notes reflected Pape's "taking down the things that are being said" during the meeting and constituted the "written terms of this illegal agreement". (J.A. 1197a-1198a) The notes were accurately characterized as one of the "two most incriminating documents" in evidence (J.A. 1199a), for if the Government's contentions were believed, guilty verdicts could be returned against all defendants based *solely* on those notes.

Despite the substantial danger of a wrongful attribution of guilt if the Government's theory was erroneous, the Third Circuit sustained the use of the notes without producing Pape as a witness even though he was "available" to testify.* In lieu of identification by their purported

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* *See*, 38a & n. 11 *infra*. Pape's "precarious state of health" does not render him "unavailable" under the standards of *Barber* v. *Page*, 390 U.S. 719 (1968); the trial court refused his motion

author, the notes were admitted *solely* upon an identification of Pape as their author on the basis of handwriting identification by a lay witness unfamiliar with both the notes themselves and the time, place and circumstances of their making. Petitioners' opportunity for cross-examination as to Pape's authorship of the notes did not obviate the lack of any opportunity for cross-examination as to the time, place or circumstances surrounding their making. Yet no witness with such knowledge ever testified at trial and one element of the Government's theory was supported by testimony of a witness under oath subject to full and effective cross-examination before the jury.

Pape's grand jury testimony indicates that confrontation would have been of substantial benefit to the defendants. His grand jury testimony indicates that on cross-examination he would have denied knowledge of the time and place at which the notes were taken, denied knowledge of what the notes recorded (the notes themselves were not intelligible without interpretation; see the example reproduced on page 13 *infra*), and denied the existence of any agreement or conspiracy.*

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to quash his subpoena on these grounds and permitted an eight day cross-examination of Quinn whose health was "on the same level as Pape". (J.A. 52a)

* Pape testified before the grand jury with respect to the HCA notes, "I don't know where they came from or where they were made" (G.J.T. 3647) and, "I don't know where I took them." (G.J.T. 3809). He denied price-fixing at Palm Beach. (G.J.T. 3656, 3816-17) In contrast to the Government's assertion to the jury that the notes recorded a price-fixing agreement, Pape, in fact, testified, even after extended "refreshment", "I didn't know where these came from, whether they came from a meeting, a telephone conversation of what" (G.J.T. 3795-96), and "even though this was on Palm Beach stationery [in fact, HCA stationery] I often carry stationery with me". (G.J.T. 3796) Near the end

The Third Circuit, however, held the guarantees of the Confrontation Clause inapplicable to the notes solely because the document did not constitute hearsay evidence in that they *might have been introduced*, not for the truth of their contents, but as recordation of one defendant's knowledge of another defendant's prices. (44a-45a) As *actually* admitted, however, the notes clearly were hearsay evidence resting for their value on the credibility of Page and offered for the truth of their contents. The notes were offered to prove that the words and numbers appearing thereon were uttered by Quinn, and discussed and agreed upon by others, during a meeting of competitors.

The hearsay rule, as the Court correctly noted, would not have prevented Page from testifying that Quinn had uttered these proposed prices at the meeting, for the fact of such utterance would be relevant and material without regard to the truth of the figures stated. But petitioners would have been able to cross-examine Page to test the accuracy of his recollection, bring out the surrounding circumstances, date the conversation and identify the participants -- benefits of confrontation utterly precluded by the manner in which Quinn's purported utterances in fact were admitted.

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of his testimony, he reiterated "I really don't recall a meeting where we sat around and agreed on a price." (G.J.T. 3838)

GX-881

Hotel Corporation of America

THE PLAZA, New York
HOTEL ROOSEVELT, New York
THE MAYFLOWER, Washington, D.C.
EDGEWATER BEACH HOTEL, Chicago
SOMERSET HOTEL, Boston
HOTEL STATLER, Boston
THE ROYAL ORLEANS, New Orleans
PALM BEACH BILTMORE, Palm Beach
HOTEL CARIBE, Coco, Ecuador

CLEARINGHOUSE MOTOR HOTELS

More fundamentally, however, the Third Circuit erroneously equated the right to confrontation with the hearsay rule contrary to this Court's express rejection of such an equation in *California* v. *Green*, 399 U.S. 149 (1970). Just as the benefits of confrontation may be denied even though the declaration is properly admitted under an "exception" to the hearsay rule, the opportunity for full and effective cross-examination as to the accuracy of the recordation and the circumstances surrounding the utterance may be foreclosed as to non-hearsay evidence. The importance of such contextual cross-examination does not depend upon the vagueness of the mystical differentiations between hearsay and non-hearsay verbal acts or utterances used as circumstantial evidence.

The focus must be upon whether the absence of the opportunity to confront a witness with knowledge as to the "facts" concerning the item of incriminating evidence materially impaired a defendant's opportunity to counter or defend against that evidence and/or impaired the jury's ability to evaluate the trustworthiness and probative value of the evidence as against that defendant. Petitioners' opportunity to argue to the jury the inherent unreliability of the Government's theory because of the *absence* of cross-examination and evidentiary support did not eliminate that need. This Court should clarify that under such circumstances the right to confrontations compels the Government to produce the available author or declarant.

2. The co-conspirator's exception to the hearsay rule should be recognized as a denial of the right of confrontation.

Without particularized analysis of the evidence in question, the Court of Appeals held that petitioners' right to confrontation had not been violated by any material element of Government's evidence.* The Third Circuit considered and rejected petitioners' contention that a contrary result was compelled by this Court's decisions in *California* v. *Green*, *supra*, and *Bruton* v. *United States*, 391 U.S. 123 (1968), and the Fifth Circuit's decision in *Evans* v. *Dutton*, 400 F.2d 826 (1968), *prob. juris. noted*, 393 U.S. 1076 (1969).

Specifically, in conflict with the rationales of *Bruton* and *Evans*, the Court approved the use of the co-conspirator's exception to the hearsay rule, concluding it was "bound" by this Court's decision in *Delaney* v. *United States*, 263 U.S. 586 (1924), as well as its own prior decision "adopted" by the Sixth and Seventh Circuits,** that the hearsay exception is compatible with the Confrontation Clause. The Third Circuit also determined that the Confrontation Clause does not compel the prosecution to produce any available witness whose declarations it seeks to use in a

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* The Court below added, as dicta, that even if its interpretation of the Confrontation Clause was erroneous the resulting denial of confrontation was "harmless error" in light of the "overwhelming strength" of the Government's case. The Third Circuit's determination misapplies *Chapman* v. *California*, 386 U.S. 18 (1967). (*See, infra* at 23).

** *Parness* v. *United States*, 415 F.2d 346 (3d Cir. 1969); *Campbell* v. *United States*, 415 F.2d 356 (6th Cir. 1969); *United States* v. *Lawler*, 413 F.2d 622 (7th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); *accord*, *United States* v. *Littman*, 421 F.2d 981 (2d Cir. 1970).

criminal trial a decision which conflicts in principle with *Green*.

The pivotal conspiratorial evidence with respect to both the "second" and "fourth" phases of the alleged conspiracy consisted primarily of out of court declarations of non testifying co conspirators.*

3. This Court should define *effective* confrontation and settle the conflicts in the Circuits.

The prosecution introduced hearsay testimony as to incriminatory declarations of alleged co conspirators who, on cross examination, disclaimed any recollection of the purported statement or conversation** (*e.g., compare*, J.A. 302a-06a, *with* 313a-16a) the precise issue which this Court stated was not ripe for decision in *Green* and as to which the Third Circuit's implicit determination conflicts in principle with decisions of the Sixth and Ninth Circuits.*

* The Court below asserted that "none of the statements attributed to nontestifying declarants was strongly incriminating" and their weight was "extremely small and insignificant." (45a & n. 18) Yet, the Court not only overlooked a number of additional hearsay items (*e.g.*, J.A. 1235a-36a, 1244a, 1302a-05a), but at least one of the examples cited by the Court was the *only* evidence that petitioner Quinn affirmatively "agreed" with a competitor on the January 1963 vitreous china price increase prior to American Standard instituting said increase (J.A. 190a-91a).

** A variant of this denial of confrontation occurred when prosecution witnesses were allowed to give opinion evidence without being able to recall the facts upon which their opinions were based. (*E.g.*, J.A. 79a-82a, 213a-29a and 234a-40a, 258a-59a). Such testimony forecloses any realistic opportunity for full and effective cross-examination.

* *O'Neil* v. *Nelson*, 422 F.2d 319 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3193 (11 10 70); *Townsend* v. *Henderson*, 405 F.2d 324 (6th Cir. 1968); *cf.*, *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *but cf.*, *United States* v. *Insana*, 423 F.2d 1165 (2d Cir. 1970).

Also, the prosecution was permitted to introduce hearsay testimony concerning out of court declarations of prior witnesses who were not examined concerning such declarations and whose testimony had concluded prior to the introduction of such evidence. (*E.g., compare* J.A. 362n *with* 139a-40a)

The Court should take this opportunity to resolve the conflict with the right of confrontation inherent in each of the aforesaid elements of the Government's mode of proof in conspiracy prosecutions.

II.

This Court should determine that the Confrontation Clause requires disclosure of grand jury testimony of a non-witness whose out-of-court statements are used at trial.

In this case the prosecutor was allowed to introduce into evidence the out-of-court declarations of several individuals (including Raymond Pape, the author of the critically important HCA notes) who were not called as witnesses. Not only were petitioners denied direct confrontation of Pape, but the trial court also denied them access to the transcript of his grand jury testimony. The Third Circuit, having approved the denial of direct confrontation, also held that the Government was not obligated to disclose Pape's grand jury testimony because it was, in the Court's opinion, inculpating "on the whole." (61a)

Whenever defendants are denied the right of personal confrontation, for whatever reason, at a minimum the Confrontation Clause requires that the defendants be given access to available information which they might have ob-

trained if confrontation had been properly granted. Pope's grand jury testimony failed to support material elements of the prosecution's conspiracy theory and contained additional information favorable to the defendants. (*See, supra* at 11 n.*) The denial of personal confrontation coupled with the suppression of the grand jury testimony greatly impaired the defendants' ability to present their defense.

Confrontation need not be an all or nothing exercise. If personal confrontation is denied, then access to all of the declarant's out of court statements can partially atone for that denial and may be of significant assistance to the defense at trial in confronting the declarant's incriminating out of court statements. Access to such material can also serve a vital function by insuring that out of court statements of witnesses are not selectively introduced at trial thereby presenting a distorted case.

In *Dennis v. United States*, 384 U.S. 855 (1966), this Court held that the grand jury testimony of a trial witness must be disclosed unless non disclosure is justified by the clearest and most compelling reasons. If considerations of justice require disclosure of a trial witness' grand jury testimony, that requirement must be even stronger with regard to a non witness whose out of court statements are used at trial. The defendant must be placed on equal footing with the prosecution with respect to the unsworn evidence against him by according to him access to information in the Government's possession which would have been disclosed had the declarant testified at trial. Both the considerations of justice enunciated in *Dennis* and the directive of the Confrontation Clause require disclosure of grand jury testimony under such circumstances.

III.

This Court should define the scope of disclosure required under *Brady*.

The Third Circuit's decision misconceives the scope of the Government's obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose evidence favorable to the accused. First, the Court's emphasis on the incriminating nature of Piper's testimony "*as a whole*" conflicts with this Court's decision in *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967), holding that the Government must disclose evidence which might have been "used in connection with *an issue* which . . . [had] been in [the] . . . case from its inception. . . ." *Brady* is not concerned merely with the disclosure of material which a defendant might introduce into evidence, but also is concerned with disclosure of information which the "defense might have made effective use [of] . . . at trial or in obtaining further evidence." 386 U.S. at 76.

Secondly, the Court's limitation of the Government's disclosure obligation merely to "material *exculpatory* evidence" conflicts in principle with *Giles*, as well as prior decisions of the Third Circuit* and of other Circuits.**

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* *United States ex rel. Butler* v. *Maroney*, 319 F.2d 622, 627 (3d Cir. 1963) (*Brady* compels disclosure of "information impinging on a vital area in . . . [the] defense"); *Curran* v. *Delaware*, 259 F.2d 707, 711 (3d Cir. 1958) (compels disclosure of "pertinent facts relating to [the] . . . defense"); *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, 765, 767 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955) (*Brady* compels disclosure of evidence "vital to the defense" or not "unimportant", to the defense).

** *E.g.*, *United States ex rel. Romeo* v. *McMann*, 418 F.2d 869 (2d Cir. 1969), *cert. denied*, —— U.S. —— (1970); *Williams* v.

The *Brady* doctrine attempts to minimize the unfairness inherent in the Government's exclusive access to a storehouse of relevant fact by requiring disclosure of such of those facts which might assist the defendant in defending against the charges against him; the grand jury proceedings are the embodiment of such a storehouse of exclusive facts. If the obligation to disclose grand jury material is restricted merely to testimony which is exculpatory when considered as a whole, the *Brady* doctrine is relatively meaningless with respect thereto.

The Court should take this opportunity to clarify the scope of *Brady* with respect to this critical source of information potentially useful to the defense and, at the very least, remand this case to the Third Circuit for a reevaluation of the suppression of Pape's testimony under a proper application of the *Brady* standard.

IV.

This Court should resolve conflicts among the Circuits concerning the requisites for admission under 28 U.S.C. § 1732(a) and the permissibility of instructing the jury to view critically the exculpatory testimony of a defendant.

The Court of Appeals decision in this case also reflects a conflict among the Circuits on two questions of critical importance to defendants in this, or any, criminal case. First, the Third Circuit followed the interpretation of 28 U.S.C. § 1732(a) adopted by the Ninth Circuit in *Standard*

Dutton, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969); *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); *Ashley* v. *Texas*, 319 F.2d 80, 85 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963).

Oil Co. of California v. *Moore*, 251 F.2d 188, 212-17 (1957), *cert. denied*, 356 U.S. 975 (1958), refusing to follow the "contrary reasoning" of the Fifth and Sixth Circuits.* The Court rejected the "regular course of business" requirements of § 1732(a) as a sufficient test for a documents' *prima facie* reliability and approved the exclusion of American Standard's corporate records of non-conspiratorial discounting as "untrustworthy" because the documents contained hearsay and opinion statements concerning competitors' pricing and marketing actions.** (50a)

Second, the Court below approved the trial court's instruction to the jury that "the things the defendants did and said at the time, may . . . be weightier than the things they say thereafter" and the "assertions of innocence by such officers [of the corporate defendants] may reflect partly legal as well as factual contentions." (J.A. 1954a-55a) The Court declined to follow the Second Circuit's disapproval of the identical instruction in *United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32, 39-40 (1970). (58a) Such a denigration of a defendant's testimony in his own behalf is incompatible with the presumption of innocence and

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* *Hanley* v. *United States*, 416 F.2d 1160 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *Continental Baking Co.* v. *United States*, 281 F.2d 137 (6th Cir. 1960).

** The Third Circuit acknowledged that the documents satisfied the express requirements of § 1732(a). Both of the assumptions of the Third Circuit supporting its determination that the documents were untrustworthy are factually inaccurate. Nearly all of the documents *did* reveal the source of the information reported from which the trustworthiness of the source could be ascertained. (*See*, E. 252-288) The information in the documents generally was collected in connection with specific construction jobs for which American-Standard was competing and, thus, American-Standard was "a party" to the transactions. (*See*, E. 252-288)

materially impairs his opportunity to present a defense where, as in petitioners' circumstances, the defense case consists entirely of testimony by an individual defendant and/or corporate defendant's officers and employees.

The confluence of the foregoing rulings magnified the prejudice in this case. The exclusion of American-Standard's records as to its, and its competitors', discounts in excess of the claimed "agreement" levels deprived petitioners of documentary evidence corroborating their witnesses' testimony that petitioners had not entered into such an agreement. In addition, the Court approved the trial court's exclusion of all other documentary evidence showing the frequency of defendants' discounting in excess of the "agreement" charged (51a), as well as Dr. Beckman's proffered charts and graphs illustrating and supporting his oral testimony that defendants' pricing behavior was consistent with market forces and inconsistent with a price-fixing conspiracy (49a). Consequently, as to both those critical elements of the defense, the defendants were confined merely to the oral testimony of the individual defendants, corroborated only by the oral testimony of the corporate defendants' employees (augmented by Dr. Beckman's testimony). Yet the trial court's charge questioned the probative value of all such testimony.

This Court, consequently, should take this opportunity not only to resolve the conflicts among the Circuits on those questions, but should clarify whether under the circumstances of this case such an instruction to the jury is consistent with petitioners' Fifth and Sixth Amendment rights to due process and the opportunity to present an effective defense.

V.

This Court should clarify the *Chapman* harmless error standard and extend its application to all error in criminal trials.

The Third Circuit found numerous errors including one possible constitutional error.* Yet the Court held that each of these errors was harmless. In so doing the Court applied improper standards.

With respect to constitutional error, such as that occasioned by the denial of the right of confrontation discussed above, this Court announced the proper standard for determining harmless error in *Chapman v. California*, 386 U.S. 18 (1967). The Third Circuit in this case has misapplied that standard.

In considering the effect of the possible violation of the Confrontation Clause the Third Circuit stated:

> "In light of the compelling strength of the government's case, we can say beyond a reasonable doubt, that the admission of hearsay statements of nontestifying declarants did not affect the outcome of the case. *Chapman v. California, supra*".

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* The *found* errors were the trial court's failure to terminate Kohler strike testimony (34a), the prosecutor's opening comments to the jury (35a), the prosecutor's closing comments to the jury (36a-37a), the restrictions on defendants' economic evidence (47a-48a, 49a, 77a), the exclusion of the Department of Commerce letter (52a), the prosecutor's failure to produce all of the Kramer statements (63a), the exclusion of Kohler's antitrust compliance evidence (66a) and possibly some of the conduct of the trial judge (29a-30a) and the exclusion of KX 132 (51a). The possible constitutional error noted was the denial of confrontation of the HCA note author Pape (43a).

This statement in the Third Circuit's opinion indicates that the Court improperly focused upon the strength of the Government's independent evidence and not upon the impact of the error. This is not the proper approach under *Chapman*. It is particularly illogical to cite the "compelling strength of the government's case" when the Court has presumed the validity of that case and disregarded contrary or conflicting evidence.

The Third Circuit may have been misled or confused by the decision in *Harrington*.* In that case the Court, applying *Chapman*, held that the evidence against Harrington was so overwhelming that the constitutional error involved was harmless beyond a reasonable doubt. The Third Circuit apparently attempted a similar analysis in this case. However, pervading and prejudicing the Third Circuit's review of the lower court proceedings is the Court's improper focus on the government's evidence to the exclusion of all other evidence. The Court did not note the conflicting evidence presented by the defense and nowhere in its opinion does the Court discuss the defense case.

Such a selective consideration of the evidence is improper at the appellate level and made it impossible for the Court to adequately judge the prejudicial impact of the found errors. Under such an approach every conceivable error would be "harmless" unless the Government did not have sufficient evidence to go to the jury in the first place. Apparently, the Third Circuit has confused the proper standard of review for determining whether there was sufficient evidence to go to the jury with the proper standard of review for determining whether found error

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* *Harrington* v. *California*, 395 U.S. 250 (1969).

was harmless. In considering whether a case should have been submitted to the jury, or similarly that no reasonable jury could have found guilt, the appellate court properly assumes the credibility of all of the prosecution evidence pointing to guilt. However, a very different standard must be applied where the case was properly before the jury and the question for review is whether found error may have improperly influenced the jury's verdict. This Court should clarify the balance of evidence analysis required for application of the *Chapman* standard.

Further, the defendants' right to proof of guilt beyond a reasonable doubt requires that the *Chapman* harmless error standard also be applied to the non-constitutional errors. In a criminal trial the defendants are entitled to a trial by jury and to a determination of guilt beyond a reasonable doubt. The selective analysis and the minimal standard used by the Third Circuit in this case deprived the defendants of these constitutional rights. While the found errors themselves were not all of constitutional dimensions, the error in application of the review standard was of constitutional dimensions.

It is the jury's function to decide the facts, to determine the credibility of the witnesses and thus to believe or disbelieve their testimonies, and to weigh the prosecutor's case against the defense case and thus to decide if the defendants are guilty beyond a reasonable doubt. The erroneous rulings by the trial court, which the Third Circuit has agreed were errors, prevented the jury from considering the evidence in a fair and impartial manner and from reaching a just verdict. The Third Circuit's presumption of the credibility of the Government's case precluded any rational

determination of the prejudicial impact of those found errors upon the jury's verdict.

The Third Circuit, in determining that merely "harmless error" resulted, apparently applied a substantial justice standard. Such a standard is incompatible with the defendants' right to proof of guilt beyond a reasonable doubt. Where erroneous evidentiary rulings result in the exclusion of material defense evidence, the exclusion cannot be "harmless" unless the reviewing Court finds that such evidence, if admitted, could not have raised a reasonable doubt in the jurors minds as to the defendants' guilt. Also, where improper or inflammatory argument is allowed, such error cannot be "harmless" unless the reviewing court finds beyond a reasonable doubt that the improper argument did not affect the jury's verdict. In this case the prosecutor's inflammatory examination concerning the Kohler strike is an example of when this standard would apply. The Third Circuit acknowledged that it was prejudicial, the petitioners were helpless to counteract its impact, and in this multi-defendant trial all the defendants were adversely affected.

In a criminal trial the jury can return a guilty verdict only if guilt is proven beyond a reasonable doubt. To apply a lesser standard on appellate review would effectively circumvent this requirement and would relegate the "reasonable doubt" standard to a mere legal fiction. The Court should take this opportunity to extend the application of the *Chapman* standard to all error in criminal cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

No. 66-295 Criminal

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION

On this 12th day of August, 1969, came the attorney for the government and the defendant appeared in person, and by counsel Hubert I. Teitelbaum, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and Verdict of Guilty of the offense of Engaging in unlawful combination and conspiracy in restraint of trade in violation of 15 USC 1 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Judgment of the District Court

It Is Adjudged that the defendant pay a fine of $50,000.00 and a proportionate share of the costs which the Clerk of Court will determine.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Louis Rosenberg,
United States District Judge.

James H. Wallace, Jr.,
Clerk.

APPENDIX B

Judgment of the District Court

APPENDIX B

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

No. 66-295 Criminal

UNITED STATES OF AMERICA

v.

JOSEPH J. DECKER

On this 12th day of August, 1969 came the attorney for the government and the defendant appeared in person and by counsel Frank L. Seamans, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and Verdict of Guilty of the offense of Engaging in unlawful combination and conspiracy in restraint of trade in violation of 15 USC 1 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Judgment of the District Court

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year, but that sentence of imprisonment be suspended after service of imprisonment for a period of sixty days (60) and defendant placed on probation for a period of three (3) years. Pay a fine of $40,000.00 and a proportionate share of the costs which the Clerk of Court will determine.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Louis Rosenberg,
United States District Judge.

James H. Wallace, Jr.,
Clerk.

APPENDIX C

Judgment of the District Court

APPENDIX C

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

No. 66-295 Criminal

UNITED STATES OF AMERICA

v.

DANIEL J. QUINN

On this 12th day of August, 1969 came the attorney for the government and the defendant appeared in person and by counsel Frank L. Seamans, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and Verdict of Guilty of the offense of Engaging in unlawful combination and conspiracy in restraint of trade in violation of 15 USC 1 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Judgment of the District Court

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year, but that sentence of imprisonment be suspended after service of imprisonment for one (1) day in the custody of the United States Marshal. Pay a fine of $30,000.00 and a proportionate share of the costs which the Clerk of Court will determine. After the service of one (1) day in the custody of the United States Marshal the defendant is placed on probation for a period of one (1) year.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Louis Rosenberg,
United States District Judge.

James H. Wallace, Jr.,
Clerk.

APPENDIX D

Opinion of the Panel of the Court of Appeals

APPENDIX D

Opinion of the Panel of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 18,182—18,187

UNITED STATES OF AMERICA

—v.—

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION; KOHLER CO.; CRANE CO.; WALLACE-MURRAY CORPORATION; UNIVERSAL-RUNDLE CORPORATION; RHEEM MANUFACTURING COMPANY; BORG-WARNER CORPORATION; BRIGGS MANUFACTURING COMPANY; PLUMBING FIXTURE MANUFACTURERS ASSOCIATION; JOSEPH J. DECKER; DANIEL J. QUINN; NORMAN R. HELD; ROBERT E. CASNER; JOHN B. BALMER; STANLEY S. BACKNER; ROBERT J. PIERSON, JR.; and GEORGE W. KELCH.

AMERICAN STANDARD, INC.,
Appellant in No. 18,182
KOHLER COMPANY,
Appellant in No. 18,183
BORG-WARNER CORPORATION,
Appellant in No. 18,184
JOSEPH J. DECKER,
Appellant in No. 18,185

Opinion of the Panel of the Court of Appeals

DANIEL J. QUINN,
Appellant in No. 18,186
NORMAN R. HELD,
Appellant in No. 18,187

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 21, 1970 and May 22, 1970

Before SEITZ, ALDISERT, *Circuit Judges* and
HIGGINBOTHAM, *District Judge*

OPINION OF THE COURT

(Filed September 23, 1970)

SEITZ, *Circuit Judge*:

These are appeals from judgments of conviction entered after jury verdicts finding violations of section 1 of the Sherman Act, 15 U.S.C. §1, by appellants American Radiator & Standard Sanitary, Inc. (American Standard); Joseph J. Decker and Daniel J. Quinn, President and Vice President respectively of American Standard's Plumbing and Heating Division; Kohler Co. (Kohler); Norman R. Held, member of Kohler's board of directors and Sales Manager for Plumbing Fixtures; and Borg-Warner Corp. (Borg-Warner).

Opinion of the Panel of the Court of Appeals

Appellants were indicted on October 6, 1966. Also indicted with appellants were five other plumbing fixture manufacturers, Crane Company (Crane), Universal-Rundle Corp. (Universal-Rundle), Rheem Manufacturing Co. (Rheem), Wallace-Murray Corp. (Wallace-Murray), and Briggs Manufacturing Company (Briggs); five other employees of corporate defendants, Robert E. Casner, Vice President & General Manager of Crane's Plumbing, Heating, Air Conditioning Group; John B. Balmer, President of Wallace-Murray; Stanley S. Backner, Universal-Rundle's Vice President for Marketing until December 1963, and Executive Vice President of the Plumbing Fixtures Manufacturers Association thereafter; Robert J. Pierson, Jr., Vice-President for Marketing of Rheem's Home Products Division; George W. Keleh, President and General Manager of Borg-Warner's Intersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA). The one-count indictment charged that from September 1962 until sometime in 1966 the corporate and individual defendants, together with various unindicted co-conspirators, engaged in an unlawful combination and conspiracy consisting of "a continuing agreement, understanding and concert of action . . . to raise, fix, stabilize and maintain the prices of enameled cast iron and vitreous china plumbing fixtures" in violation of section 1 of the Sherman Act. The indictment further stated that:

> "13. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

"(a) Held Meetings at various times under the guise of so-called 'official' PFMA meetings and during conventions of plumbing fixtures distributors and wholesalers at hotels and clubs, including, among others Greater Pittsburgh Airport Hotel, Pittsburgh, Pennsylvania; Sheraton-Chicago Hotel, Chicago, Illinois; Shoreham Hotel, Washington, D. C.; The Americana of New York, New York, New York; The Waldorf-Astoria, New York, New York; Palm Beach Biltmore Hotel, Palm Beach, Florida; and Chicago Athletic Club, Chicago, Illinois, at which times said defendants and co-conspirators:

"(i) agreed to increase prices of enameled cast iron and vitreous china plumbing fixtures;

"(ii) agreed to limitations on maximum discounts from published prices of enameled cast iron and vitreous china plumbing fixtures;

"(iii) confronted one another with reported deviations from agreed upon maximum discounts and published prices of enameled cast iron and vitreous china plumbing fixtures;

"(iv) agreed to discontinue the manufacture of regular enameled cast iron plumbing fixtures which were lower-priced than acid-resistant enameled cast iron plumbing fixtures; and

"(v) agreed to seek and to obtain, as part of the agreement to discontinue the manufacture of enameled cast iron plumbing fixtures, the revision of the Enameled Cast Iron Commercial Standard to pro-

vide for only acid-resistant enameled cast iron plumbing fixtures;

"(b) Published price announcements and price books increasing the prices of enameled cast iron and vitreous china plumbing fixtures in accordance with agreements reached;

"(c) Discontinued the manufacture of regular enameled cast iron plumbing fixtures in accordance with the agreements reached;

"(d) Telephoned and otherwise contacted one another between meetings concerning:

"(i) increased prices on vitreous china plumbing fixtures;

"(ii) reported deviations from agreed upon maximum discounts and published prices of enameled cast iron and vitreous china plumbing fixtures; and

"(iii) the discontinuation of the manufacture of regular enameled cast iron plumbing fixtures;

"(e) Used the office of Secretary of PFMA, among other things, to schedule and arrange for the aforesaid meetings, to maintain a line of communication between said defendants and co-conspirators and to co-ordinate the efforts of said defendants and co-conspirators in seeking and obtaining the revision of the aforesaid Enameled Cast Iron Commercial Standard."

The defendants named in the indictment that are not involved in this appeal entered pleas of *nolo contendere*

in the fall of 1968 and were thereafter sentenced. Appellants entered pleas of not guilty, and their sixteen-week jury trial began on January 13, 1969. Their basic theory was that the price moves alleged to be the result of illegal agreements were in fact the result of the operation of ordinary economic forces in the market place. The government called ten witnesses and rested its case on February 19, 1969. Appellants Quinn, Decker, American-Standard, Held and Kohler presented a total of 21 witnesses and rested their cases on April 23, 1969. Appellant Borg-Warner elected not to introduce any testimony of its own although its counsel did cross-examine witnesses and place some exhibits in evidence. The trial transcript consisted of 10,256 pages and more than 900 exhibits were introduced into evidence. The jury retired to deliberate on the afternoon of May 2, 1969, and at 10 p.m. returned guilty verdicts against all six appellants, and they were thereafter sentenced.

Appellants have filed a Joint Brief in this court advancing numerous grounds in support of their claim that all their convictions should be reversed. They argue that they were denied a fair trial because of the trial judge's excessive and partisan participation in the trial and by his erroneous evidentiary rulings; that they were substantially prejudiced and denied a fair trial by the improper and inflammatory conduct of the prosecuting attorneys; and that they were prejudiced by the trial judge's procedures in connection with the jury charge, errors in the charge, and the pressured submission of the case to the jury. In addition separate briefs have been filed by all appellants but

American Standard. Each advances various individual grounds for reversal. Unlike appellants American Standard and Quinn, appellants Kohler, Held, Borg-Warner and Decker argue that because of the weakness of the government's case against them, their motions for judgment of acquittal should have been granted.

We will first deal with the arguments raised in appellants' Joint Brief and then examine those raised in the individual briefs. In order to evaluate the claim of appellants Kohler, Held, Borg-Warner and Decker that the evidence against them was insufficient to go to the jury (and to provide some indication of the strength of the government's case against all of the appellants), we will begin our analysis with a review of some of the government's evidence.

The Government's Case

We emphasize at the outset our conclusion that the evidence of an illegal price-fixing conspiracy is compelling. The proof of the conspiracy rests in large part upon the testimony of witnesses who were themselves defendants or executives of defendant corporations. These witnesses described various meetings they attended where price discussions occurred and price fixing-agreements were reached. When this multiple "eyewitness" testimony is considered in light of the largely admitted simultaneous price moves made by the indicted manufacturers, the strength of the government's case becomes apparent.

We will discuss in turn the four "phases" of the conspiracy alleged by the government. We note that the government was not required to prove that all the means and

methods alleged in the indictment were utilized or that each defendant participated in each phase of the conspiracy or, indeed, that any of the illegal agreements were carried out. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). A conviction against any defendant is warranted if the jury finds beyond a reasonable doubt that the conspiracy alleged in the indictment existed and that the defendant knowingly became a member of the conspiracy, either at its inception or at a later phase of its operation. Moreover, no formal agreement is necessary to constitute an unlawful conspiracy; it is sufficient that a concert of action be contemplated and the defendants conform to the arrangement. "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946). See also *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965).

October-November 1962 Enameled Cast Iron Bathtub Price Increase

It is undisputed that, with the exception of Borg-Warner, all the indicted corporations published identical increased prices on special truckload and carload "discount prices" on certain high volume enameled cast iron bathtubs in October and November 1962. Although Borg-Warner did not issue a printed sheet, there was evidence that it "published" similar price increases on the bathtubs in question

by a series of telephone calls made in October to sales representatives around the country, each of whom communicated the prices to wholesale distributors. We think the evidence would support a jury finding that these bathtub price increases were the direct result of an agreement reached at a meeting of the indicted corporations' sales officials held in appellant Quinn's room at the Sheraton Chicago Hotel on September 17, 1962, the evening before a regularly scheduled PFMA meeting.

There was evidence that the following persons were present at this September 17 gathering in Quinn's room: appellant Quinn (American Standard), appellant Held (Kohler), defendant Keleh (Borg-Warner), defendant Casner (Crane), defendant Backner (Universal Rundle), Charles J. Callanan, Jr., a Rheem executive and its representative to the PFMA, and J. V. Cannon, Director of Marketing of the Eljer Division of Wallace-Murray. There was substantial "eyewitness" testimony concerning price discussions and agreements at this gathering. For example, the government's first witness, Callanan (Rheem), testified that he attended this September 17 gathering in Quinn's room and that specific prices for bathtubs in question were discussed there. He further testified that when he left the meeting he knew what the price increases would be:

> "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?"
>
> "The Court: If anything.
>
> "The Witness: The prices as reflected in my bulletin of November 2, 1962 [Rheem's published discount

> prices), were the prices that I came out of that room with that understanding."

These prices were the identical prices adopted by all the other indicted manufacturers. Moreover, although Callinan could not recall specific statements by each attendee concerning the bathtub price increase, he did testify that defendant Kelch (Borg-Warner) participated in price discussions and that appellant Held (Kohler) "was there listening" to them.

Cannon (Wallace-Murray) also testified that he was present at the meeting in Quinn's room and that prices for the bathtubs in question were discussed there. He further stated that when he returned to Pittsburgh he reported the price discussions to his superior, Loren H. Bennett, Vice President and General Manager of Wallace-Murray's Eljer Division and told him he "felt confident there would be a price increase" on the bathtubs in question. Bennett confirmed that Cannon reported the September 17 price discussions to him:

> "Q. To the best of your recollection, Mr. Bennett, what did Mr. Cannon tell you concerning these increased prices?
>
> "A. To the effect that there was a general discussion, that higher prices were wanted and needed, by everyone, and that there was a tentative agreement to increase prices, tentative discussion. I couldn't say that there was a definite agreement by everyone, but prices were discussed."

In light of this evidence, and considerable other evidence in the record, we think the jury could have found that the October-November 1982 committed cast iron bathtub price increases were the result of a price fixing conspiracy. As to all appellants[1] except Decker (American Standard),[2] there was certainly sufficient evidence to go to the jury.

The Agreement to Maintain and to Increase the Prices of Vitreous China Plumbing Fixtures

The second goal of the conspiracy, the government asserted, was to maintain and ultimately to increase prices on vitreous china plumbing fixtures. It is undisputed that on January 14, 1983 Crane announced an approximately 7 per cent increase in published wholesaler net prices for all vitreous china plumbing fixtures and at the same time withdrew certain special discount prices on some high volume items. On January 23, 1983 American Standard increased both its wholesaler net prices and its special dis-

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[1] Kohler contends that there was insufficient evidence of Hebd's authority to impose criminal liability on Kohler. We will discuss our conclusion to the contrary along with our consideration of the other arguments raised in the separate brief of appellants Kohler and Hebd.

[2] Decker argues that there was no evidence to justify a finding that he participated in any of the four phases of the conspiracy. The government, on the other hand, argues that there was sufficient evidence for the jury to conclude that Decker participated in all four phases. Since we are convinced of the sufficiency of the evidence (which will be discussed later) concerning Decker's participation in the fourth phase of the conspiracy, the price fixing concerning the changeover to all acid-resistant fixtures, and since that evidence alone is sufficient to support the jury verdict against Decker, we need not pass on the sufficiency of the evidence of his involvement in the first three phases.

count prices on vitreous china plumbing fixtures by about 7 per cent. Within a month thereafter, all the other indicted manufacturers had substantially followed American Standard's new prices, and Crane retroactively reinstituted special discount prices at the same higher level adopted by the other manufacturers. We think there was ample evidence for the jury to find that these price increases were the result of an illegal agreement.

Callanan (Rheem) testified, for example, that at the September 17, 1962 gathering in Quinn's room at the Sheraton-Chicago hotel:[4]

> ". . . there was a discussion with regard to raising the prices of china on the Special Buying Opportunity [special discount price sheets] but it was felt that unless the short-line manufacturers increased their price, we couldn't get too far away from it."

He also related that he concluded at the time that the special discount prices in effect then would be maintained by the group:

> "Q. What was decided with respect to the vitreous china staple prices on your Special Buying Opportunity of May 1962, which was the subject of discussion?
>
> "The Court: If anything.
>
> • • •

[4] Borg-Warner increased its trade sheet prices on vitreous china plumbing fixtures by 7 per cent on February 12, 1963.

[4] As we have stated there was evidence that Quinn (American Standard), Held (Kohler), and Kelch (Borg-Warner) were among those present.

"A. My opinion when I left the room was that there would be no change in staple prices in that Special Buying Opportunity [special discount price sheet]."

Callanan also testified that at the September 17 meeting "there was a feeling that there should be an across-the-board raise of some percentage to strengthen the china prices."

The evidence also indicates that top level representatives of the Enameled Cast Iron Industry Group of the PPMA met at the Shoreham Hotel in Washington, D. C. on November 20, 1962, the day after a special dinner meeting of the Enameled Cast Iron Industry Group in Washington. Robert J. Pierson, Vice President for Marketing of Rheem's Home Products Division, testified that at this November 20 meeting he participated in a discussion regarding some proposed price increases with Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner) and Cassner (Crane). He said that Cassner told the group his company had instructed him to raise prices and that they were going to certain levels in spite of what the industry might do. Pierson further testified that, at this point:

"There was a general discussion regarding each individual company's reaction to it. It was my opinion when I left that people probably would follow the lead of Crane in some form or another."

We have already pointed out that on January 14, 1963, Crane was the first defendant to announce an across-the-board 7 per cent increase for all china fixtures in its whole-

sales net price book and that shortly thereafter all the other indicted corporations followed.

Charles Betz, who at the relevant time was Briggs' Sales Vice President, testified that in January 1963 he had a telephone conversation with Raymond A. Pape, a Crane official, concerning vitreous china prices and told him he "would certainly go along" with a sensible price increase "because these past price practices were very disastrous to our business." Moreover, Betz testified that, when Briggs subsequently increased its china prices, it was because of its competitors' actions and pursuant to his telephone conversation with Pape.

Government witnesses also established that, after the vitreous china increase had been effected by all defendants but Borg-Warner, there remained considerable doubt whether the new prices would remain in force. However, the evidence indicates that at a "special meeting" of the Enameled Cast Iron Industry Group of the PFMA at the Waldorf-Astoria in New York on February 7, 1963 several of the conspirators agreed to try to maintain the new prices. Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Callanan (Rheem), Pape (Crane), Bennett (Wallace-Murray), and Backner (Universal-Rundle) attended this special meeting. Bennett testified that after the "formal" part of the meeting there was a "price discussion." He stated that he stayed for only a few minutes and then went to Quinn's room upstairs, and that Quinn told him he would come up later and report whatever transpired. Quinn arrived at 4:30 p.m. and they discussed the price decisions made at the meeting. With

respect to the vitreous china price increase, Bennett testified as follows:

> "Q. Did you discuss with Mr. Quinn did you tell him what Murray Corporations' intentions were with respect to the recent vitreous china increase?
>
> • • •
>
> "A. We had published a new price and when we did, it was our intention to try to adhere to those prices to the best of our ability. So this would have been understood, that we would try to maintain any new prices that we had published.
>
> • • •
>
> "Q. Did Mr. Quinn indicate to you at this time, in his hotel room, what the view of the people downstairs were in connection with the recent vitreous china increase?
>
> • • •
>
> "A. Well, the general consensus was that the new prices would—we would try to maintain the new prices."

Five days after Kelch (Borg-Warner) attended this February 7 meeting Borg-Warner also announced a 7 per cent across the board increase on china fixtures.

Thus in the light of the above and other substantial evidence in the record, we think a jury finding that vitreous china prices were fixed as a result of illegal agreements would be plainly justified. The evidence on this point against all appellants, except perhaps Decker, was sufficient to go to the jury.

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The Agreement to Limit Maximum Discounts From Wholesales Net Prices

The third phase of the conspiracy, the government asserted, was an agreement to limit discounts on quotations on project or job work to a maximum of 15 per cent from wholesaler net prices on enameled cast iron fixtures and 30 per cent on china fixtures. We think there was sufficient evidence to justify a jury finding that the defendants illegally agreed to limit maximum discounts in violation of the Sherman Act.

Callanan testified that there was a discussion about job pricing and maximum discounts at the gathering in Quinn's room at the Sheraton Chicago hotel on September 1, 1962:[4]

"Q. What was the discussion that evening in Mr. Quinn's room concerning discounts from sheet prices, Mr. Callanan?

"A. I can't remember what the discussion was, but I came away with the opinion that discounts that I would be using would be 15 per cent on iron and 30 per cent on china.

"Q. What was your—

"The Court: That you alone would be doing that?

"A. I don't know what other people were doing.

• • •

"The Court: All right. Then, you would do it. You came away with the opinion that only you would be doing what you said you would be doing?

"A. Oh, no.

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[4] See note 4, supra.

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"The Court: That is what we want to know. If it is that, say that.

"A. I was of the opinion that other people would be using the same structure.

"Q. What other people, sir?

"A. The other members who were in the room that evening.

"Q. And what figures were they?

"A. Fifteen per cent on iron and twenty per cent on china."

Moreover, Bonnett (Wallace Murray), who had been upstairs in Quinn's room during the price discussions at the February 7, 1963 meeting at the Waldorf-Astoria* testified that Quinn in his report to him about the price discussion:

". . . indicated there had been some discussions about discounts on plumbing fixtures and to try to keep some semblance of reason, and that there was a tentative discussion or agreement not to go below a certain point."

Bonnett also stated that the specific discount limits discussed were 15 per cent on cast iron and 20 per cent on vitreous china. He further testified that he told Quinn "we would try to adhere to those discounts."

We think there was sufficient evidence in the record for the jury to find an illegal agreement to limit maximum discounts and that there was sufficient evidence against all appellants, except perhaps Decker, on this point.

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*Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Calhoun (Bloom), Pape (Crane), Bonnett (Wallace-Murray), and Buehner (Universal Rundle) attended the Waldorf-Astoria meeting.

The Agreement to Eliminate Regular Enameled Cast Iron Plumbing Fixtures and to Increase the Prices of Acid Resistant Fixtures

The fourth phase of the conspiracy alleged by the government was an agreement to discontinue the production of the lower priced line of regular enameled cast iron plumbing fixtures with the planned result of an increased price structure resulting from the changeover to all acid resistant enameled cast iron fixtures. Regular enameled fixtures, because of their lower price, constituted the defendants' largest selling line of enameled cast iron plumbing fixtures; regular enameled fixtures accounted for more than $30,000,000 in gross annual sales at American Standard alone. Nevertheless, beginning in early 1961 the industry began considering the possibility of making only the higher priced acid resistant fixtures "in response to the increasing competition from plastic fixtures and steel fixtures both of which were all acid-resisting." (Appellants' Joint Br. p. 24). On June 7, 1963 the Department of Commerce at the urging of the industry announced a revision of former Commercial Standard CS 77-56, effective July 10, 1963, and for the first time made acid resistant cast iron enamel fixtures the industry standard.

On July 1, 1963 American Standard announced its intention to discontinue production of regular enamel cast iron plumbing fixtures and it published revised prices on its acid resistant fixtures which were higher than those for the old regular enamel fixtures. Within two months, all the indicted producers of cast iron plumbing fixtures announced the discontinuation of regular enameled fixtures

and published similar new prices for acid resistant fixtures. We think there was ample evidence to justify a jury finding that the changeover to all acid resistant fixtures with its concomitant new price schedule was the result of an agreement in violation of section 1 of the Sherman Act.

For example, there was evidence that acid resistant prices were agreed upon at a gathering after a meeting of the PPMA Enameled Cast Iron Industry group at the Biltmore Hotel, Palm Beach, Florida, on March 28, 1963. Pierson (Rheem) testified that after the official meeting he met with Quinn and Dreher (American Standard), Kelch (Borg-Warner), Rebl (Kohler), Canner (Crane), Callanan (Rheem), Palmer and Cannon (Wallace-Murray), Barbour (Universal Rundle) and possibly Page (Crane) in Quinn's hotel room where they discussed the changeover and the new acid resistant prices. Pierson testified in part as follows:

"A. The discussion revolved [sic] around the specific time-table that would occur in this change from—in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.

"Q. Were specific prices mentioned during the course of this meeting?

"A. Yes.

"Q. Were specific prices mentioned for the 14-inch and the 16-inch lavatories?

"A. Yes.

"Q. Were there any prices or any formulae presented at this meeting concerning small ware? That is lavatories?

"A. There was a plan, yes, a price schedule put forth.

• • •

"Q. What was the formula put forth, sir?

"A. It was approximately as we have indicated the increase in our price schedule.

• • •

"Q. What was decided at this meeting, if anything, Mr. Pierson?

"A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.*" (emphasis added).

Pierson specifically recalled that appellant Held (Kohler) said that he was speaking for his company and that they would go along with the plan. He also stated that the entire group remained at the meeting until the price discussions were concluded. Callanan confirmed that there was a price discussion at this gathering and that a specific pricing structure was put forth. Cannon also testified that the "proper philosophy" of pricing in the new all acid resistant market was discussed at this gathering and that certain prices were decided upon.

There was also evidence that the new acid resistant prices were again discussed and the illegal agreement reaffirmed at a meeting at the Airport Hotel in Pittsburgh on May 15, 1963 attended by Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Casner and Pape (Crane), Bonnett and Cannon (Wallace-Murray), Backner (Universal Rundle), and Callanan (Rheem). Bonnett was asked at trial what was decided at the Airport Hotel meeting with respect to certain colored bathtub prices and responded:

> "It's difficult to say whether a definite decision was reached on these prices, they were discussed by most of the people there but we certainly did not poll the group to say, 'Would you do this, will you do that?' It was my understanding when I left the meeting that the prices would generally be on this level."

Pierson did not attend this meeting but testified that when his subordinate Callanan returned from the meeting he reported to him that it "was his opinion that the plan to phase out regular enamel and the price schedule proposed was going to go through."

Moreover, there was evidence that the illegal agreement was again discussed and reaffirmed at a meeting in Quinn's room at the Waldorf-Astoria Hotel in New York, on June 26, 1963 attended by appellants Decker, Quinn and Held, as well as Kelch, Casner, Pape, Balmer, Bonnett, Cannon, Pierson, Callanan and Backner. Pierson testified that at this meeting there was "a general review of the proposed plan on this [all acid resistant] product line and the pricing that was related thereto." Cannon testified that Quinn or Decker showed him a copy of the announcement American Standard was going to make concerning the changeover to all acid resistant fixtures and the new acid resistant prices; he further stated that this document was discussed by the group.

We think the overwhelming evidence on this phase of the conspiracy clearly warranted a jury finding that the changeover to all acid resistant fixtures and its concomitant price rise was the result of an illegal price-fixing conspiracy. Certainly there was sufficient evidence to support

a jury finding against all appellants on this issue, including the appellant Decker. We think the evidence concerning events which transpired at three conspiratorial meetings he attended was certainly sufficient to support the jury verdict against him.[1]

JOINT ARGUMENTS

Partisan Participation by the Trial Judge

Appellants contend that they were denied a fair trial because of the district judge's excessive participation in the trial, although they disclaim any intent to charge personal hostility on his part. They "explain" his conduct by stating their belief that from the outset the judge was convinced of the appellants' guilt and thus viewed their conduct and that of their attorneys as designed either to be obstructive or to invite error.

The appellants have culled from the over 10,000 page trial transcript some three hundred incidents which they say illustrate the objectionable nature of the judge's con-

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[1] As the Supreme Court pointed out in *United States* v. *Wise*, 370 U.S. 405, 416 (1962), "a corporate officer is subject to prosecution under §1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy —be he one who authorizes, orders, or helps perpetrate the crime. . . ."

In addition to the above evidence against Decker, we note the following facts: Decker was President of American Standard's Plumbing and Heating Division; Quinn was Vice President and testified that he had a close working relationship with Decker; and the evidence of the participation of American Standard and Quinn in all phases of the conspiracy was strong. In light of all this, we find no merit in Decker's claim that the case against him was too weak to go to the jury.

duct. They have broken these examples down into the following categories:

1. The trial judge's deprecation of appellants' evidence;
2. The trial judge's cross-examination of witnesses and other prosecutor-like intrusions;
3. The trial judge's abusive and belittling treatment of defense witnesses and counsel;
4. The trial judge's openly suspicious attitude toward defense counsel and witnesses;
5. The trial judge's contrasting treatment of the government.

We are completely satisfied that no one of the incidents relied upon by appellants deprived them of a fair trial. But appellants contend that the incidents were so pervasive and frequent that they cumulatively had that result. In order to evaluate this most serious charge an examination was made of each page of the trial transcript.

A reading of the many unrelated incidents selected from a jury trial lasting sixteen weeks gives a distorted impression of the judge's conduct. Many of the incidents relied on by appellants are nothing more than the typical rulings and comments found in any trial transcript. Others arise from the judge's understandable desire to keep the trial moving. Certainly the trial judge was testy on occasion and certainly the reasons given for some of his rulings left something to be desired. But all of this must be kept in perspective. This was a long trial and in great measure

involved an exceedingly technical subject. Much of appellants' grievance is really directed at the correctness of the judge's evidentiary rulings which are matters for independent consideration. But in fairness to the judge it must be said that many of the objections of appellants' counsel were so lacking in substance or so repetitive that they deserved to be consistently overruled. Because of the number of these rulings, however, they could have created the false impression with appellants that judicial objectivity was lacking.

Our evaluation of the record leads us to conclude that the trial judge did not unduly deprecate appellants' evidence, that in their setting his questions to witnesses did not exceed proper bounds either in tenor or extent, that there was nothing approaching abuse either to defense witnesses or their counsel, that the trial judge did not portray an openly suspicious attitude toward defense counsel and witnesses, and finally, that there was none of the so-called contrasting treatment of the government which appellants claim demonstrates the trial judge's unfairness to them.

Prosecutor Misconduct

Appellants advance numerous reasons why they were substantially prejudiced and denied a fair trial as a result of the improper and inflammatory conduct of the government attorneys. We shall consider them seriatum.

Appellants first assert that the prosecutor indulged in misleading and inflammatory cross-examination of appellant Norman Held (Kohler) concerning alleged unfair

labor practices by Kohler prior to the indictment period. In his opening to the jury Kohler's counsel said:

> "Now, the plant up in Kohler, Kohler Village, employs about four or five thousand people. It is the principal employer in the whole county. One way or the other the economy of the county depends upon full employment at Kohler. Kohler accepts that responsibility and has a philosophy to try to discharge it. It is a remarkable thing. There is a period in the 1930's and thereafter, you people, some of you people remember the 1930's and thereafter, a period of 17 years when not an employee of the Kohler Company lost a day's pay through layoff. In this decade the same thing has been true."

Over government objection Heid was permitted to testify as follows:

> "Q. And how large a town is Kohler and would you just describe it, please, the village of Kohler?
>
> "A. That is just a small town of several thousand and it is just a little bit different from the usual factory type of town. It is a planned community and it is probably due to the fact that the Kohler family and the Kohler Company didn't want what might be termed a factory town and brought in town planners, architects and engineers with the result that it is rather a pretty little place with its own school system and its own governing body, the people that live there and with a high incidence of owner-owned homes.

"Q. People mostly own their own homes there, is that correct?

"A. Yes, sir.

• • •

"Q. Mr. Held, could you give us a brief history of the Kohler Company, when it started to make plumbing fixtures, when it was started, and so forth?

"A. Yes, I think I can do that. The company had its start in 1873 when one Michael Kohler, an immigrant from Austria, started a manufacturing plant mostly castings in Sheboygan, Wisconsin. And at that time he produced farm tools, farm equipment, some things like iron drinking fountains and iron horse troughs and items similar to that, some ornamental things, too, that could be cast at the time. He did some castings in bronze or brass and steel tubes. However, about ten years later, 1883 or so, he began to get into enameled utensils and graduating into the enameled plumbing fixture business and then a new plant was needed, so around about 1900 or so, a new plant was constructed about three miles west of Sheboygan, Wisconsin, and this is the present site of the plant now and by that time, the primary product was plumbing fixtures, and at this time enameled cast iron plumbing fixtures. And about 1905, the son of John Michael Kohler, who passed away, Mr. Walter J. Kohler took over as president and from that time forth, the business grew and became emphatically a manufacturer of plumbing fixtures and began to grow and market its product more widely."

On cross examination the prosecutor asked Held the following question:

> "Q. Mr. Held, didn't you purposely leave out of your history of the Kohler Company the fact that between 1954 and 1960, Kohler had one of the longest and bitterest strikes in American history at the end of which Kohler Company was found by the National Labor Relations Board to have engaged in an illegal refusal to bargain in good faith and in other unfair labor practices?"

An objection was made by the attorney for American Standard. Nothing was said by Held's attorney. However, the attorney for Kohler addressed the court as follows: "If the Court please, I urge the Court not to sustain the objection. I would wish the witness to be allowed to answer." Whereupon the witness purported to explain in a rather oblique fashion his lack of reference to the strike. The prosecutor then asked additional questions which went into some detail concerning unfair labor practices found by the National Labor Relations Board,[8] eventually referring to Kohler's purchase of guns, ammunition and tear gas, eviction of strikers, investigating the private lives of union officials, and other inflammatory topics.

The emotional nature of some of the cross-examination on this subject matter may have tended to temporarily divert the jury from passing on the merits of the criminal

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[8] Appellants contend that the questions did not fairly state the findings of the National Labor Relations Board. We think the deviations are not of independent significance here.

charges, at least as to Kohler and Held. However, Kohler and Held invited some such inquiry by first attempting to create a picture of a completely beneficent employer. Moreover, the initial statement by Kohler's counsel, when a threshold objection was made to such cross-examination, "opened the door further." However, when Kohler's counsel later objected on the ground that the questioning had become inflammatory—by reference to Kohler's purchase of guns and tear gas, etc.—we think the judge should have terminated the line of questioning. We think its potential for prejudice outweighed its evidentiary value. We say this despite our realization that the witness never did permit a possibly less inflammatory development of the government's position because of a claimed lack of personal knowledge of events during the strike period although some of his favorable direct testimony concerning Kohler suffered from the same infirmity.

In the circumstances of this case, however, we are unable to find that the nature of the interrogation constituted reversible error even as to Kohler and Held. It was an incident involving two appellants. The time spent on it before the jury was minimal, perhaps one hour in a total of sixteen weeks. The trial proceeded for several weeks after the incident. At Kohler's request, the matter was not alluded to either in the summations or the charge. Considering these factors in their setting and in conjunction with the strength of the government's evidence on the criminal charge, we cannot find that this incident could have so affected the jury that a fair trial was denied appellants.

The appellants also accuse the prosecutor of using his opening statement to lead the jurors to believe they were victims of the alleged conspiracy.* The trial judge denied appellants' motion for a mistrial. We fully recognize that a prosecutor is required to maintain a high standard of conduct in the performance of his duties. In a proper case his conduct may require a mistrial. See *United States* v. *Schartner*, 426 F.2d 470 (3d Cir. 1970). But we think the prosecutor here was saying nothing which was not rather self-evident in view of the nature of the charge and the products involved.

Appellants further contend that the prosecutor appealed to jury bias by stating in his opening and closing remarks that the grand jury which returned the indictment was composed of local residents. Passing over the appellants' failure to object on this score, we think it lacks sufficient substance to warrant reversal either alone or in conjunction with other claimed errors. Indeed, defense counsel were not above indicating to the jury that appellants were represented by Pittsburgh counsel as opposed to the government's Washington representation.

Appellants next assert that the government intentionally adduced incriminating and/or impeaching evidence through improper and prejudicial examination of witnesses. Their first grievance under this heading relates to the govern-

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* Now, when the plumbing contractor gets it, he doesn't keep it. He sells it. To whom does he sell it? He sells it to you. He puts another price on top of it. So, if you have the manufacturers, as is the case here, agreeing to increase prices that they sell plumbing fixtures to their wholesalers, sooner or later you are going to be paying that increase, the public. Particularly, on those plumbing fixtures which were the heart and soul of this conspiracy."

ment's use for refreshment purposes during cross-examination of appellants Quinn and Decker of certain tape recordings of alleged telephone conversations with defendants and third parties made by William Kraemer.[10] It must be emphasized that the jury never was given an identification of the voices on the tape or told what was said. The issue reduces itself to whether the district court committed error by permitting the use of tapes and earphones in an attempt to refresh the witnesses' recollection rather than requiring the use of the transcript of the tapes. We think an exercise of discretion was involved and we cannot find an abuse of discretion under the circumstances of this case. *United States v. McKeever*, 271 F.2d 669 (2d Cir. 1959); see 3 Wigmore, *Evidence* §765 (3d ed. 1940).

Appellants also charge the prosecuting attorneys with violation of their professional obligations of candor and fairness. We have examined the bases for this charge and find them to be without merit. It is obvious that in a case of this magnitude the prosecutor would slip on occasions or suffer from a faulty recollection of the evidence. Indeed, conflicting evaluation by counsel of the probative significance of evidentiary matter is often a significant aspect of a trial, even more so when it is a jury trial. We think the appellants' charges against the prosecution are lacking in substance.

Appellants' last objection is to some statements made in the prosecutor's closing although they did not move for a mistrial. Certainly the prosecutor did overstep the bounds of propriety in a few instances in the course of his

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[10] Kraemer was Executive Secretary of the PPMA.

five hour closing, particularly in appearing to personally vouch for the integrity of a government witness and in implying the existence of damaging evidence outside the record. But in our view the trial court, by the explicit instructions it gave the jury at both the government's and appellants' request, fairly corrected the matter. We do not view the prosecutorial aberrations as being so prejudicial to defendants that they were deprived of a fair trial. *See United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 237 (1940).

Evidentiary Rulings

Appellants argue they were prejudiced by certain rulings on government evidence. They first challenge the propriety of the admission of Government Exhibits 551 through 556 (HCA notes). As we have noted, the elimination of regular enamel products and the fixing of acid resistant enamel prices was the fourth alleged event in the criminal conspiracy charged by the government. A part of the government's evidence on this aspect of the conspiracy concerned events at an informal session after the PFMA meeting at the Palm Beach Biltmore on March 28, 1963. As evidence of the agreement to eliminate regular enamel and to fix acid resistant fixture prices, the government offered two documents. One was an American Standard worksheet entitled "Acid-Resisting Enamel Prices" dated March 1, 1963. The other consisted of six pages of undated and unsigned handwritten notes on the stationery of the Hotel Corporation of America (HCA notes), which echoed figures and statements on the American Standard price worksheet. The appellants claim the admission of the HCA notes was reversible error.

They first argue that the notes were inadequately identified in that there was insufficient evidence concerning their author for them to be admitted in evidence. The government's contention is that Raymond Pape, a Crane official, wrote the notes at the Palm Beach meeting. In support of their position, government counsel introduced a stipulation by all counsel that the HCA notes were found in Crane's files and were stapled together. The government also called a former secretary in Pape's department to make a lay handwriting identification of the notes.[11] She testified that she had done work for Pape and had been familiar with his handwriting "at times." She identified the handwriting on four of the six pages as resembling Pape's. She could not identify the writing on the two remaining pages.[12]

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[11] The government represents in its brief that although Pape himself was technically available to be called as a witness, he was not called to identify the HCA notes because of the precarious state of his health. Indeed, Pape filed a motion to quash the government's subpoena to him on this ground. Although his motion was denied, the trial judge indicated his intention to take all possible measures short of granting Pape's motion to protect him. Moreover, the government represented to the trial judge that it would avoid calling Pape if at all possible. Pape died of heart failure shortly after the trial ended.

[12] The witness testified as follows concerning each of the six pages:

(1) GX-551: "As I remember, it looks as if it could be Mr. Pape's but I can't be sure right now."

(2) GX-552: "[I]t resembles Mr. Pape's."

(3) GX-553: "It looks like it could be Mr. Pape's."

(4) GX-554: "There really isn't too much handwriting on here to say too much about it." . . . . "I can't really say."

(5) GX-555: "That appears to be Mr. Pape's."

(6) GX-556: "I can't be sure about this one."

Appellants contend that since a substantial danger of a wrongful attribution of guilt existed if these documents were erroneously identified, no less than a "positive, unequivocal identification of the handwriting must be required." In fact the weight of authority requires only that a *prima facie* case of the alleged author's identity be established for the documents to be admitted. See generally 3 WIGMORE, *Evidence*, §693 *et seq.* (1940); MCCORMICK, *Evidence* §189 (1954). The ultimate issue of their authorship and the probative weight to be afforded them is for the jury. We conclude upon a reading of the record that the requisite *prima facie* case as to the four pages identified by the secretary was established. Thus, we hold that the trial judge did not abuse his discretion in admitting them.

Two of the pages were admitted without any handwriting identification. The jury was instructed that these pages might be compared with the other four pages for handwriting similarities should the other four be determined to be Pape's. Appellants challenge the propriety of allowing the jury to make such a comparison. They assert that the standard for comparison—the four pages—must be "admitted or proved" to be genuine before they may be used for comparison purposes. They further assert that the evidence was insufficient for the trial judge to properly determine the genuineness of the handwriting on the four pages so that they could be used as a standard of comparison.

Where documents are admitted for purposes other than handwriting comparison, they may be used by the jury as a standard for handwriting comparison if the handwriting

is admitted or proved to be that of the alleged author. *Williams* v. *Conger*, 125 U. S. 397, 411-15 (1888); cf. 28 U.S.C. §1731. The vast weight of authority requires that the trial judge determine whether the genuineness of the handwriting on the documents to be used as the standard is sufficiently proved. E.g., *United States* v. *Swan*, 396 F.2d 883 (2d Cir. 1968); *Citizens' Bank & Trust Co. of Middlesboro, Ky.* v. *Allen*, 43 F.2d 549 (4th Cir. 1930); 7 WIGMORE, *Evidence* §2020 (1940). In those jurisdictions where the trial judge is required to make the initial determination of genuineness the courts have adopted differing standards of proof. We believe the proper standard requires that there be sufficient evidence so that a jury finding of genuineness would not be subject to reversal as against the weight of the evidence. See *United States* v. *Swan*, *supra*.

In view of the present state of the law as developed above, we are convinced that the trial judge, had he considered this question directly, could only have properly held that the four pages were appropriate for jury use as a handwriting standard.[13] We say this because the evidence supplied by the lay handwriting witness, a former Crane employee, in conjunction with the fact that the HCA notes were subpoenaed from Crane's PFMA file, were

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[13] In view of our disposition of this issue, we need not decide at this time whether the requirement of an initial determination of genuineness by the trial judge ought to be eliminated and the question of genuineness both as to the standard and the other documents be left solely to the jury. Such a course has been suggested by some commentators. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Article IX, Rule 9-01 (March 1969).

stapled together, and were internally consistent in content convince us that a jury finding that the four pages were in Pape's hand would be fairly supported by the evidence. Thus, we conclude the four pages were properly before the jury for use as a handwriting standard.

The appellants challenge the judge's instruction on the HCA notes in this connection as well. They contend that the instruction assumed that the four pages to be used as a handwriting standard were in Pape's hand when in fact that very issue was in dispute. We have read the instruction and do not find that it contains such an assumption.

The appellants' final argument concerning the admissibility of the HCA notes is that they were irrelevant and immaterial because the time, place, and circumstances of their making were not brought out. The notes reflected proposed prices for products which the American Standard worksheet contained. Some of the prices on the worksheet were crossed out or circled and changes were penciled in. The HCA notes were similarly marked to show these changes. Moreover, general policy statements written in pencil on the worksheet were also recorded in the HCA notes. Most convincing of all, however, is the fact that the American Standard proposed prices, which were reflected in the HCA notes found in Crane Company's files, were in some instances only tentative prices which were changed before their public announcement. The inescapable conclusion is that Crane Company had pre-knowledge of American Standard's proposed prices. Even without knowing the source of this information, that evidence would be relevant and material to the question whether a price-fixing conspiracy existed.

Appellants next assert that the court erred in permitting the government to lead witnesses in critical areas. They concede that the trial judge has a broad discretion but they assert in effect an abuse of discretion. Considering that the government's non expert witnesses were defense oriented we cannot find from an examination of the record that the trial court abused its discretion. Indeed, we think the record is replete with answers by such witnesses establishing a foundation for the use of leading questions. Nor can we find, as appellants contend, that the "cross examination" device was so employed by the government on its witnesses as to have an adverse effect on the reliability of their testimony. We also find without merit appellants' contention that by permitting government witnesses to testify in terms of impressions or conclusions in so called critical areas, the trial judge substantially impaired their right of cross examination.

Appellants also contend in a somewhat oblique fashion that the co conspirator hearsay exception deprives them of their Sixth Amendment right of confrontation. We note, however, that a decision of this court holds that the Confrontation Clause ruling in *Bruton* v. *United States*, 391 U. S. 123 (1968), did not invalidate the hearsay exception rule in conspiracy cases. *Parness* v. *United States*, 415 F.2d 346 (1969). This view has been adopted in other circuits. *United States* v. *Lawler*, 413 F.2d 622 (7th Cir. 1969); *Campbell* v. *United States*, 415 F.2d 356 (6th Cir. 1969). Moreover the United States Supreme Court held in 1924 that the conspiracy exception did not deny a defendant his right of confrontation. *Delaney* v. *United States*, 263 U.S. 586.

Appellants have called our attention to *California* v. *Green*, ——— U.S. ———, decided June 23, 1970, which they say supports their contention that use of the co-conspirator exception to the hearsay rule violates the Confrontation Clause. In *Green* the court held in a non-conspiracy criminal case that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Although the Court stated that it had no occasion in *Green* "to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements," its opinion suggests the use in criminal cases of such exceptions to the hearsay rule will be subject to careful scrutiny by the Court."

We do not find that *Green* alters our conclusion that we are bound by holdings that use of the co-conspirator exception does not violate the Confrontation Clause. Nevertheless, we have examined the record for hearsay declarations of nontestifying declarants. We have concluded that, even if the co-conspirator exception be deemed a violation of the Confrontation Clause where the declarant does not testify, the rule's application in the present case was harmless error under *Chapman* v. *California*, 386 U. S. 18 (1967).

"Mr. Justice Harlan, concurring in *Green*, stated his conclusion that "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* all *available* witnesses whose declarations it seeks to use in a criminal trial." A Confrontation Clause challenge to the co-conspirator exception has been made in *Evans* v. *Dutton*, 400 F.2d 826 (5th Cir. 1968), prob. jur. noted 393 U.S. 1076 (1969).

Appellants' specific claims of prejudice are sketchy and conclusory.[18] Basically, they complain that incriminating statements of Casner and Pape were introduced although neither appeared on the stand. Pape's "testimony," they say, "came in through hearsay testimony of Cannon and Schambach and through the HCA notes." Casner's "testimony," they say, came in through the hearsay statements of Pierson and Callanan.

We have specifically reviewed the testimony of Callanan, Cannon, Pierson and Schambach (Pape's subordinate at Crane), as well as the HCA notes, for statements attributed to Casner and Pape. We have also reviewed the testimony of the other government witnesses for statements attributed to nontestifying declarants.[19] We have found surprisingly few such statements. Some of those statements are probably not hearsay at all;[20] that is, they are not "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCORMICK, *Evidence* §225, at 460 (1954). The HCA notes, for example, clearly were not offered for the truth of their contents and did not rest for their value

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[18] They have made little attempt to document their claim by specific page references to the record.

[19] E.g., N. T. 978 (J.A. 361a), 989 (J.A. 365a), 1008 (J.A. 368a), 2397 (J.A. 204a), 2469 (J.A. 214a), GX 518.

[20] "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were spoken, and not whether they are true." *State* v. *Wentworth*, 37 N.H. 217 (1858), quoted in 6 WIGMORE, *Evidence* §1766, at 179 (1940).

upon the credibility of Pape or anyone else. See McCormick, supra, at 463-66.

The instances of true hearsay declarations by persons who did not take the stand amounted at best to a handful.[18] In any case, none of the statements attributed to nontestifying declarants was strongly incriminating. The sum of its weight was extremely small and insignificant when the record is considered as a whole. In light of the compelling strength of the government's case, we can say beyond a reasonable doubt, that the admission of hearsay statements of nontestifying declarants did not affect the outcome of the case. *Chapman* v. *California*, supra.

Appellants also assert that, assuming the validity of the co-conspirator exception, the trial judge committed error in not requiring the government first to prove prima facie by the acts and declarations of each appellant the existence of the conspiracy and the participation therein by each appellant before admitting the acts and declarations of each conspirator against all appellants. This court is well aware of the danger of finding guilt by mere association which is inherent in a conspiracy trial involving numerous defendants. See the concurring opinion of Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949). However, we note that the trial judge was faced with a difficult order-of-proof problem because of the multi-step nature of the alleged conspiracy and because the government was not able at the very outset to show the requisite involvement of every defendant. The control of the order of proof was a matter within the discretion of the court.

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[18] E.g., N.T. 1929-29 (J.A. 190-91a), 2016-20 (J.A. 298-300), 2183 (J.A. 300).

See *Esco Corp. v. United States*, 340 F.2d 1000, 1009 (9th Cir. 1965). We find no abuse of discretion in the trial judge's rulings on the admissibility of the hearsay evidence in this conspiracy case.

The appellants assert, however, that at the time the hearsay evidence was received the trial court erroneously refused to give cautionary instructions to the jury with respect to the limitations on the use of hearsay evidence. Assuming that such an instruction would have been desirable, we fail to find where the appellants requested such limitations at the pages of the transcript cited in their brief. In any event, by the time the first two government witnesses had finished testifying, a prima facie case of conspiracy had been made out involving all the defendants with the possible exception of appellant Decker who was later tied in.[19]

Appellants next contend that the government's evidence fatally varied from the one-count charge in the indictment. Appellants' position appears to be that the proof tended at best to show two or more separate conspiracies and thus a variance existed because only one conspiracy was charged. We think the short answer is that the evidence was consistent only with the existence of one overall conspiracy as described in the indictment. We say this because the separate means and methods were connected to each other not only by a common plan to affect prices in the plumbing fixture industry, but also by a substantial identity of each of the defendants and co-conspirators in agreeing to and

[19] We think the above discussion is also a complete answer to appellants' argument that they were denied the right to an individual determination of their guilt or innocence.

carrying out the challenged price moves. Moreover, the evidence also showed that more than one phase of the conspiracy was frequently discussed at each of the conspiratorial meetings, especially at the initial September 17, 1962 meeting in Quinn's room at the Sheraton-Chicago Hotel. The fact that each defendant's proved participation may not have been identical to that of the others does not itself multiply the number of conspiracies.

Appellants also contend they were denied a fair trial because the trial judge erroneously excluded or limited their evidence. In furtherance of this contention, the appellants cite four specific evidentiary rulings by the trial judge which were allegedly erroneous.

1. *The Beckman Charts.* Through its expert economic witness Dr. Donald Beckman, Kohler offered 107 charts graphically representing Kohler economic data for the years 1960 through 1967. The trial court restricted Kohler's graphic economic evidence to the four year period covered by the indictment[20] on the theory that any economic evidence before or after the indictment period was irrelevant. We understand the trial judge's desire to avoid remote evidence in view of the magnitude of the trial and the potential for confusing the jury. However, we have no doubt that in this case evidence of the preceding two

[20] In the interest of precision we note that the court ruled that the charts would conform to its temporal limitation if they included all of 1962 although the indictment charged the conspiracy started sometime in September of that year. In the interest of convenience we shall refer to the time period contemplated by the court's ruling as the "indictment period."

years and of the year following the end of the alleged conspiracy would not have suffered from that defect.

Appellants contend that they were substantially prejudiced by the trial court's temporal limitation because Dr. Beckman was unable to utilize all 107 of his charts. In fact, however, the trial judge indicated he would admit the charts if they were modified to reflect data limited to the indictment period and did admit those charts so modified. Thus, it is clear the trial court's ruling did not preclude the use of any charts and did not substantially harm the appellants' defense for that reason.

The appellants contend, however, that the charts as amended to reflect only the indictment period were much less convincing in support of Dr. Beckman's testimony than they would have been if admitted as originally constructed. Thus, they claim that the restriction on these charts substantially diluted the effect of Dr. Beckman's testimony. We cannot agree. Dr. Beckman testified at some length with the aid of those of his charts which were admitted. His testimony was forceful and direct and in view of his distinguished credentials as an economic expert could hardly have been easily dismissed by the trier of fact. His thesis in simple terms was that, based on the relevant economic indicia of competitiveness, Kohler's pricing activity could only be the result of competitive forces in the marketplace. The strength of Dr. Beckman's testimony is exemplified by the following quotation which is but one of several such statements he made during his testimony.

> "So the conclusion that seemed to me inevitable was that no prudent businessman would do such thing

> unless he was forced to do it by economic forces, and if there had been an agreement, it certainly would not have been for the purpose of selling below costs and lowering the income of the company. So it [Kohler's pricing practice during the indictment period] had to be, in my judgment, *a result of highly effective competition; in fact of vigorous competition.*" (N.T. 8951) (emphasis added)

In addition, those charts which were admitted strongly support Dr. Beckman's analysis of the indictment period. Moreover, his testimony dealt with economic data not shown on his modified charts so that the substance of the material excised by the trial court's ruling was supplied by his oral testimony. For these reasons we conclude that the temporal limitation imposed on Kohler's charts, while error, did not substantially harm either Kohler or the other appellants.

2. *American Standard Field Reports.* Appellants also assign as error the district court's refusal to admit American Standard's exhibits 60 to 104. These exhibits were characterized by an American Standard witness as memoranda and documents made up by American Standard's Pricing Service in the regular course of its functions in recording information from field offices with respect to competitive activity and prices offered by competitors. They were offered as business records, pursuant to 28 U. S. C. §1732, to prove that American Standard and its competitors were not limiting discounts to customers as the indictment charged they had agreed to do. The dis-

trict court refused to admit these exhibits for the truth of their contents as business records.

These exhibits were in the main based on information supplied by sources whose trustworthiness could not be ascertained from the documents themselves and was not established by oral testimony. Moreover, because the exhibits concerned transactions to which American Standard often was not a party, the normal presumption that a party keeps accurate records of its transactions is not available here. Because the regularity with which these records were kept does not tend to establish their accuracy, we believe the reasoning of the Ninth Circuit is particularly applicable here. In a landmark case in this area, the Ninth Circuit held that exhibits substantially similar to those offered here were not admissible as business records. *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188, 212-17 (9th Cir. 1957) *cert. denied* 356 U. S. 975 (1958). Since we believe trustworthiness of the documents is the touchstone, we not are inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co.* v. *United States*, 281 F.2d 137, 148 (6th Cir. 1960). See *Palmer* v. *Hoffman*, 318 U. S. 109, 113-14 (1943). Thus we conclude the rejection of these exhibits as business records was proper.

Following the court's ruling, these exhibits were re-offered "as typical of the program or policy followed or the procedure followed by [American Standard] district managers throughout the United States." (T. 6051). The court again refused the exhibits. The basis for this ruling was that the exhibits were cumulative in that a similar

exhibit had already been introduced to illustrate the testimony concerning American Standard's method of gathering this information. We agree the exhibits were properly excluded on this ground.

3. *Kohler Exhibit 132.* Appellants contend the trial court erroneously excluded this exhibit entitled "Some Examples of Competitive Quotations—1963" which was offered to prove that Kohler and its competitors had not maintained maximum discount levels. The exhibit is a listing of over 600 specific job quotations during 1963 where Kohler quoted discounts which exceeded levels the government claimed the appellants had agreed to maintain. On voir dire it was established that some 2,000-2,500 quotations were made in 1963 and that these 600 odd examples listed in the exhibit were substantially all the quotations above the allegedly agreed upon maximum percentages. Yet the exhibit, by its title and contents, in no way revealed these facts. Thus, we agree with the government that the exhibit was to some extent misleading. On the other hand, the mere existence of a significant number of quotations exceeding the alleged maximum levels was relevant to the appellants' defense. While we might have ruled differently, however, we are not convinced the trial judge's exclusion of this exhibit in the form offered amounted to an abuse of discretion. Moreover, in view of the extensive defense testimony concerning the existence of these discounts, we believe the jury was to a large extent made aware of the appellants' proof on this point even without the exhibit.

4. *The Commerce Department Letter.* Kohler offered a multi-part exhibit containing a letter from an official of the Commerce Department to prove that the appellants had not misled that Department concerning the general acceptance of regular enamel products in the industry. The government claim was that the appellants had deceived the Commerce Department on this matter in furtherance of their alleged agreement to change the Commercial Standard. The letter was dated October 18, 1962 and arguably demonstrated that the Commerce Department at that date believed that regular enamel products were standard in the industry, which in appellants' view would tend to weaken the government's case on this issue.

The letter was objected to on the ground that it referred to other correspondence which was not part of the submission, and thus, in the government's view, was objectionable hearsay. The trial court rejected the exhibit on the independent ground that its admission would violate the best evidence rule. The court ruled that the author of the letter "is the best evidence here, not his letter." Understandably the government does not argue on appeal that either the hearsay or the best evidence theory justified exclusion of this letter. We are convinced from our reading of the record that the letter ought to have been admitted although its probative value was minimal. The hearsay objection is groundless and in our understanding the best evidence rule does not require the author of the document be produced if the original document is offered.

However, even though we conclude the court erroneously excluded this exhibit, we are not convinced that the prejudice suffered by the appellants was substantial.

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Jury Charge and Submission of the Case to the Jury

Appellants claim that they were substantially prejudiced by the trial court's conduct in connection with the preparation of his charge to the jury. Their first claim is that the court committed reversible error because it flatly refused to rule on each of their joint requests for points for charge. In fact the trial court did flatly refuse to rule on the original sixty-seven requests submitted by the appellants on the grounds they were too voluminous and general to be of any aid to him in preparing his charge. The government's requests were treated similarly. The appellants claim this refusal to rule on each of their requests so impeded counsels' preparations for argument to the jury that the appellants were denied effective assistance of counsel.

We note that the trial judge has broad discretion in ruling on points for charge. In this case appellants' points were prolix, imprecise, and often intertwined evidentiary assumptions with law in a highly partisan manner. Moreover, shortly after these requests were submitted the court informed counsel that he would give them a reasonable time to resubmit their requests in an acceptable form. Indeed supplemental requests were submitted and the trial judge ruled on them in substance. On this record, we conclude the trial judge did not abuse his discretion by refusing to rule on each of the appellants' initial requests. See 8 MOORE'S FEDERAL PRACTICE, Paragraphs 30.03 [1] and [2] (1969).

The appellants further contend that the trial court failed to accurately inform them of the contents of his

charge and that they were substantially prejudiced in their arguments to the jury for this reason. We note that the judge did advise counsel at some length of the substance of the points on which he would charge. However, appellants still claim that they were harmed in this connection and point to three specific instances of the substantial prejudice they suffered because they remained uncertain as to the substance of his charge on some crucial points. First they claim that they argued to the jury that an acquittal was required if the jury found that several conspiracies existed rather than one continuing conspiracy as was charged in the indictment. They claim they were prejudiced because the government argued a different version of the law and the judge failed to charge on their separate conspiracies theory. As we indicated previously, this record could support a finding of no more than a single continuing conspiracy. Moreover, the trial court told the appellants that he would not charge on a multiple conspiracy theory. Thus, if the appellants actually believed they would get such a charge or were entitled to one, they were self-misled, not judicially. There was no error here.

Appellants' second contention in this regard is that the court's pre-charge uncertainty concerning whether it would charge that an agreement to eliminate a product was a per se violation of the Sherman Act caused them not to argue this point to the jury for fear of subsequent contradiction by the trial judge. In fact the trial judge indicated that while he had some reservations, he was inclined to charge along the lines requested by the appellants. Appellants never advised the judge that they required a definite ruling from him on this point in order to aid them in the prepara-

tion of their closing arguments to the jury. Indeed, counsel for Kohler did argue to the jury on this point as follows:

> "[T]here is no dispute that there was a change made in the Commercial Standard . . . eliminating from the standard any reference to non-acid-resisting enamel ware, and that all . . . or substantially all of them announced to the public their intention to discontinue the manufacture of regular enamel plumbing fixtures."
>
> "Now, there is no question that those events occurred. Although the government spent a good part of its case proving those facts, they are not in dispute and *they are not illegal; not a single one of them is illegal in itself. In and of itself, it was perfectly lawful. . . .*" (N.T. 9659-60) (emphasis added)

In these circumstances, we do not find that the trial judge committed error. Appellants also claim that the court failed to charge on this point and thus the jury could have convicted because they believed such an agreement, to eliminate a product, standing alone, was proof of guilt. A reference to the court's charge belies the claim that this matter was not satisfactorily covered in the charge.

The appellants' final contention is that they were harmed because the judge gave a "missing witness" charge although neither the government nor the appellants requested it. In view of the many allusions to "missing witnesses" by counsel for both sides in their closing arguments, we do not believe the judge abused his discretion by so charging.

In connection with the jury charge itself, the appellants claim five errors. First, they contend the trial judge failed to charge the jury with respect to the responsibility

of an "acceptor" of the Commercial Standard. They claim they were substantially prejudiced because the jury was not made aware that the elimination of regular enamel products may have been occasioned by the general acceptance of the Commercial Standard rather than a conspiratorial agreement. In effect the appellants wanted a charge that acceptance of the Standard indicated an intention to follow it. The trial judge gave a lengthy charge concerning the Commercial Standard in which he dealt with the nature of the Standard and its legal effect. In view of the comprehensive charge on this matter, we find no merit in appellants' argument.

Second, appellants assert they were prejudiced by the trial judge's failure to charge that the jury should consider whether the appellants tried to conceal their activities in evaluating whether illegal agreements were made. Assuming such a charge would have been proper, we do not believe the trial judge abused his discretion by not giving this charge on a point of at best tangential significance.

Third, appellants contend that the judge failed to charge on their specific theories of the case, viz. (a) he did not state "the defendants' theory that the January, 1963, vitreous china price increase came about as a result of the direct order of the . . . chief executive officer of Crane Co., and the subsequent independent decisions of the defendants;" and (b) that "the discontinuance of the manufacture of regular enameled cast iron bathtubs and lavatories was the result of the independent acceptances by the defendants of the Commercial Standard and not of any illegal

agreement." The judge's charge adequately covered these points in our view.[21]

Appellants' fourth contention with respect to the charge is that the court failed to accord any weight to appellants' economic evidence. In fact the court reviewed many of Dr. Beckman's conclusions and attributed them to the other appellants as well as Kohler. The appellants complaint, however, that the judge unfairly charged on the permissible inferences to be drawn from pricing patterns. They contend that while he charged that similarity of pricing was some evidence of agreement though certainly not conclusive, he failed to charge that dissimilarity in pricing was some evidence of no agreement. While we agree with appellants that such a charge would be proper, in view of the court's lengthy review of Dr. Beckman's conclusions that Kohler's pricing established the absence of an agreement, we do not believe the court abused its discretion in this matter.

Appellants' final argument is that the trial judge erred in charging that "the things the defendants did and said at

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[21] He charged that the appellants contended:

"That economic conditions dictated the prices which they charged and even if there was uniformity with other competitors' prices . . . such prices were the result of market forces and not the result of agreement."

He further charged that the appellants contended:

"That American Standard sought the changeover from regular enamel to acid-resisting enamel by means of the Commercial Standard, legally, as advised by counsel." (J.A. 1942a).

Similar instructions were given for Held and Kohler (J.A. 1944a), and Borg-Warner's contention that it was factually distinguishable from the other defendants on this issue was explicitly noted as well (J.A. 1945a).

the time, may . . . be weightier than the things they say thereafter." And that "assertions of innocence by such officers may reflect partly legal as well as factual contentions." They claim this charge, in effect, negated the impact of the testimony of defense witnesses. Passing over the fact that the appellants apparently did not object to this charge, we find no error in giving this charge on this record. *United States* v. *Chas. Pfizer & Co.*, CCH Trade Reg. Rep., Para. 73, 1219 (2d Cir. 1970) is clearly distinguishable on its facts.

Appellants contend that they were prejudiced when the judge gave the indictment to the retiring jury without first deleting the names of those defendants who had pleaded nolo contendere. They allege this prejudice arose because the jury must necessarily have inferred that these persons and corporations had been convicted of the crime charged. Thus, they contend, those persons who were listed in the indictment which the defense did not call would be presumed by the jury to be unfavorable to the appellants. The court instructed the jury both at the very beginning of the trial and at some length during his charge that they were not to speculate concerning the guilt of co-conspirators not defendants then on trial but named in the indictment. We are convinced on this record that the appellants did not suffer substantial prejudice in this matter. We also decline to hold that the trial judge abused his discretion in allowing an unmodified version of the indictment to go to the jury, although we think the better procedure would have been to cover the names when defendants so requested.

Appellants' next claim is that they were denied a fair trial because the court gave the case to the jury on a

Friday afternoon rather than on the following Monday. Their assertion that "the jury could only have concluded that it was required to reach a decision on Friday night . . . [and] must have inferred that the court was in a hurry to convict the defendants" is groundless. There is absolutely nothing in the record to suggest that the trial court conveyed to the jury a desire for a quick verdict.

Brady v. *Maryland and Jenks Act Claims*

Appellants also contend that the government attorneys did not fulfill their obligations under *Brady* v. *Maryland*, 373 U. S. 83 (1963), and the Jenks Act, 18 U. S. C. §3500, to furnish certain materials to them. *Brady* held that due process requires that the prosecution not suppress evidence favorable to an accused that is material either to guilt or to punishment; the Jenks Act provides that, after a government witness has testified on direct examination, the government must produce any statement of the witness in its possession "which relates to the subject matter as to which the witness has testified." The government maintains that it has no *Brady* material and that it has complied fully with its duties under the Jenks Act.

Appellants first assert that the failure of the government to disclose to them prior to trial the grand jury testimony of Raymond A. Pape constitutes a violation of the *Brady* rule. Pape was formerly Vice President and General Manager of defendant Crane's Plumbing, Heating, Air Conditioning Group. As we have indicated, he did not testify at trial and died shortly thereafter, on July 15, 1969. During the pendency of this appeal the government furnished his grand jury testimony to appellants and to this court. Appellants argue that Pape's grand jury testimony was *Brady* material because Pape denied before the grand

jury that any price-fixing agreement was reached at the March 28, 1963 Palm Beach Biltmore meeting. They consider the government's arguing to the jury that the HCA notes were written evidence of the illegal agreement made at the Palm Beach meeting "as grave as the 'deliberate deception of court and jury by the presentation of testimony known to be perjured.'"

We have carefully reviewed all of Pape's grand jury testimony, particularly those portions called to our attention by appellants, and are convinced that the government did not violate *Brady* by not producing it prior to trial. We note that while Pape denied that any formal price-fixing agreement[22] was made at Palm Beach he did admit that he had discussed prices with competitors at PFMA meetings. He also admitted that at least two months prior to their public announcement he knew what the new acid resistant prices would be because he "had verbal discussions so that [he] was fairly certain what the other people would do." Grand Jury N. T. 3842-47. Moreover, as to the HCA notes, Pape unequivocally admitted that they were in his handwriting, and stated that "apparently someone was telling me what American Standard was going to charge," and that he felt the figures on the notes "represent new prices that American Standard was going to charge when they came out with their acid resisting enamel." Grand

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[22] It should be pointed out that his denials seem in part to be based on an erroneous view of the law of conspiracy. See, e.g., Grand Jury N. T. 3830:

> ". . . I can't picture or remember anybody agreeing. I would say that I had the general idea when we left the meeting that these were the prices. Now, that is sort of the indirect feeling of an agreement, but I can't picture everybody just saying it. But I would say that my feeling leaving the meeting was that these were the prices."

Jury N. T. 3673 74. He further testified in part as follows about the HCA notes:

> "On this stationery that includes the Palm Beach Hotel, and there are several hotels on here, the one that I had previously felt that it couldn't have been Palm Beach, but after reading these [refreshment] documents, I feel that this could very well have been that early where I got this detail. This is the one that I say was American Standard because it has American Standard's specific prices and the names of the American Standard tub." Grand Jury N. T. 3844.

On the whole, Pape's grand jury testimony was extremely incriminating and we cannot say that it contains any material exculpatory evidence.

Appellants also assert that the government's failure to reveal the contents or existence of certain statements in its possession by William E. Kraemer was a violation of *Brady* and the Jenks Act. Appellants first learned of the existence of these statements while this appeal was pending during the course of Kraemer's deposition which was being taken in certain civil treble damage actions against the indicted plumbing fixture manufacturers. Believing that these statements might contain *Brady* or Jenks material, appellants filed a motion in this court seeking to compel the government to give them copies of these statements and to make them part of the record. By order of April 21, 1970 another panel of this court directed the government to produce the documents in question for *in camera* inspection by this panel. The government produced 16 documents pursuant to the April 21 order and repre-

sented that four other requested documents are not in its files and that it has no record that they ever were.

We have carefully examined all of the Kraemer statements. Most of them contain material that is exceptionally damaging to defendants. We have found no material exculpatory evidence in any of the statements. Moreover, we do not believe that appellants' mere speculation about materials in the government's files requires the district court or this court under *Brady* to make the materials available for their inspection. The possibilities for abuse in such a procedure are manifest. Cf. *United States* v. *Crisona*, 416 F.2d 107, 116 (2d Cir. 1969), *cert. denied* — U. S. — (1970); *United States* v. *Franchik*, 413 F.2d 950, 952-53 (2d Cir. 1969); *United States* v. *Harris*, 409 F.2d 77, 80-81 (4th Cir.), *cert. denied* 396 U. S. 965 (1969). It follows that appellants' motion to have the Kraemer statements produced to them must be denied.

Appellants also contend that the Kraemer statements should have been produced at trial pursuant to the Jenks Act. They correctly point out, however, that "Mr. Kraemer was called as the final prosecution witness at trial but was not asked any questions by the prosecutor concerning alleged price fixing and merely identifies briefly certain meetings of the PFMA."[23] He was not cross-examined by any of the appellants. His grand jury testimony and what the government represented to be his Jenks Act statements had been previously produced to appellants.

We have reviewed Kraemer's trial testimony and have examined the Kraemer statements with a view toward the application of the Jenks Act. Only one of the documents

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[23] Appellants' Response and Appendix to Government's Motion to Show Cause, p. 34a.

can be considered to "relate to the subject matter of the testimony of the witness." This document lists certain meetings of the PFMA, including three of the meetings the minutes of which Kraemer identified on the stand. There is no conflict between the dates shown on the list and the minutes Kraemer identified. Moreover, appellants at the time had copies of these minutes. Indeed, there was no dispute about the dates of the meetings in question at trial. Under these circumstances we are convinced that the government's failure to produce the document which related to Kraemer's testimony was harmless error. See *United States* v. *Kahaner*, 317 F.2d 459, 473 (2d Cir.), *cert. denied* 375 U. S. 835 (1963).

Separate Appeals

Daniel J. Quinn

The only argument raised by appellant Quinn in his separate brief is that the trial judge erred in refusing to permit his counsel to question him on direct examination about his health so that the jury could properly evaluate his demeanor. Quinn, who was 68 years old at the time of trial and in ill health, testified for two days on direct examination and seven days on cross examination. Quinn asserts that to assist the jury in evaluating his demeanor and to take into account any effect his illness might have had on his demeanor, his counsel toward the close of direct examination asked him if he had ever been under a doctor's care for any serious health problem since his retirement. The court sustained the government's objection to the question, noting:

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> "I have observed the witness all the way through too. I find nothing here that shows other than a very good witness, one who is responsive, one who is alert and shows no signs of any conduct because of any physical impasse.
>
> "This is a proper question presented to the court in the event only there is a conviction. But it is improper here because prejudice might outweigh the facts."

A trial judge in balancing the probative value of evidence against possible prejudicial effect is vested with broad discretion. The trial judge here observed the witness testify and concluded that the competing interests should be balanced in favor of excluding evidence of Quinn's poor health. On this record we cannot say that his ruling was an abuse of discretion.

Joseph J. Decker

The only argument raised by appellant Decker is that the trial judge erred in refusing to grant his motion for judgment of acquittal. We have already indicated, however, that the evidence of Decker's participation in the fourth phase of the conspiracy, the price fixing concerning the changeover to all acid resistant fixtures, was strong and certainly sufficient to support the jury's verdict.

Kohler Co. and Norman R. Held

Appellants Kohler and Held challenge the sufficiency of the evidence against them. We have already concluded that the evidence that Held participated in all four phases of the conspiracy was strong and certainly sufficient to

support the jury's verdict. Kohler, however, argues that there was insufficient evidence to support a finding that any criminal activity of Held was done in the course of his employment with Kohler and within the scope of his authority. We disagree.

Kohler asserts that there was no evidence to support a finding that Held had authority to determine its prices. Kohler also emphasizes that it was against its rigid anti-fraternization policy for Held even to have social contact with its competitors. However, the government points out that Held was Kohler's sales manager and a director of the corporation. Moreover, even though Held testified that he had no actual authority to publish prices, he admitted that he was the official who recommended price changes to Kohler's chief executive and that he had unlimited authority over the company's discounting or "job pricing."

We think the jury could have found that Held's illegal actions were within the scope of his authority. There was testimony by Callanan that at one of the conspiratorial meetings Held claimed "that he was speaking for his company." It would also be reasonable to conclude that Held's authority to recommend prices enabled him to commit Kohler to the conspiracy. Since Kohler adopted the conspiratorial prices and Held participated in meetings at which those prices were agreed to, the jury could reasonably have concluded that Kohler's price moves were taken as a result of the conspiracy. Moreover, the fact that Held may have been acting contrary to his instructions about fraternizing with competitors could hardly negate an inference that he was motivated at least in part by a desire to serve Kohler, and thus acting in the course of his employment. See *Restatement* (Second) *of Agency* §§228 *et seq.*

Kohler also asserts that it was prejudiced by the court's charge on a corporation's responsibility for its agents' acts and by its refusal to admit certain evidence concerning the rigor of its antitrust compliance policy. Assuming it was error to reject certain of Kohler's evidence concerning its corporate policy of strict compliance with the antitrust laws, we do not think Kohler was prejudiced in any way. The evidence was of marginal relevance and substantially cumulative.

As to the agency instruction, Kohler contends in substance that the court failed to say that the jury had to find both that the agents' acts were within his authority *and* within the course of his employment, that is, performed with the intention of benefiting the employer. In fact, the jury was so instructed.

The relevant instructions were as follows:

> "A corporation, itself, cannot attend a meeting or make decisions; it must act through agents, such as its officers, directors and employees. In order for a corporation to be responsible for the acts or statements of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their employment or their apparent authority. Acts within the scope of employment are acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform. Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging

> from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.
>
> "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.
>
> "If you conclude that an agent of a defendant corporation, acting on behalf of the corporation and within the scope of his employment or his apparent authority, engaged in a price-fixing conspiracy, then it is no defense that the corporation had instructed its employees orally or in writing to comply with the antitrust laws and not to engage in price discussions with competitors."

Thus, the judge charged in substance that the corporation would be responsible if the agent acted "on behalf of the corporation and within the scope of his employment or his apparent authority." When this instruction is viewed in light of the judge's definitions of "scope of employment" and "apparent authority," it is clear that the agency charge was not erroneous. We also note that one of appellants' points for charge stated that a corporation is criminally liable for an agent's unlawful acts done "within the scope of his authority"; no mention was made of the "course-of-employment" or "on behalf of" element. Finally, we point out that Kohler's counsel did not comply with the requirement of F. R. CRIM. PROC. 30 that, before the jury retires to consider its verdict, he state distinctly to the trial judge the matter in the charge to which he objects and the

grounds of his objection. Kohler's counsel did not make the trial judge aware that he objected to the way these elements of corporate responsibility were presented and thereby give him a chance to conform his instruction to Kohler's wishes before the jury retired.

Kohler also asserts that the agency instruction was "oversimplified" because it "did not discuss the elements in the case which might aid the jury to determine whether anything done by Norman Held could have been done within the course of his employment by Kohler . . . ." We hardly think that the judge's failure to review the evidence on this point with the jury would be error. Moreover, the judge did review some of Kohler's contentions on the agency point earlier in his charge.

Kohler's final criticism of the agency instruction is that it did not state that the jury must be satisfied beyond a reasonable doubt that the elements for corporate responsibility were present. This contention is without merit. Near the beginning of his charge, the trial judge made clear that a defendant can be found guilty only if the jury is satisfied beyond a reasonable doubt as to every essential element of the crime. The court was not required to reiterate the reasonable doubt requirement in the agency instruction. In any event, this claim was not called to the judge's attention in the Rule 30 colloquy.

Borg-Warner Corporation

Borg-Warner argues in its separate brief that the evidence of its participation in the conspiracy was insufficient to support a conviction. We have already indicated our conclusion to the contrary; there was strong evidence that

Borg-Warner participated in all four phases of the conspiracy.

Borg-Warner's other separate argument is that it was prejudiced in certain respects by errors in the court's charge. Its first argument deals with the "missing witness" instruction that was given. Near the beginning of his charge, the trial judge gave the standard instructions on the presumption of innocence. In part, he charged as follows:

> "Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has a right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses of the prosecution. The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence."

However, since in their closing arguments counsel for all the parties except Kohler urged the jury to draw inferences from the failure of an opposing party to call certain witnesses, the trial judge endeavored to provide general guidance to the jury in its consideration of such arguments by charging as follows:

> "There have been some arguments here on the failure of a party to produce a witness or evidence, as the case may be. Where a party, without satisfactory explanation, fails to call a witness, who is known to that party, who has knowledge of material facts and whose interest or prejudice is in favor of such party,

or would likely be in favor of such party, the inference is that his or her testimony would not sustain the contention of the party, if the witness were called. Also, where evidence which would be properly part of a case, is within the control of one party or the other, whose interest would naturally be to produce it, and without satisfactory explanation, the party fails to do so, the jury may draw an inference that the evidence would be unfavorable, if that evidence was presented at the trial. If the testimony of the witness or the evidence would be merely cumulative, these rules would not apply. So, too, where witnesses are callable and evidence producible by any party, these rules do not apply.

"Now, whether you apply these rules depends upon what you find the facts to be."

Borg Warner questions the propriety of this charge. First, it suggests that "[t]he net effect of such an instruction was to say that the defendant should have come forward and proved its innocence" and thus the charge "directly conflicts with the presumption of innocence." The short answer to this claim is that a missing witness charge has long been accepted as appropriate even in criminal cases: See *Graves* v. *United States*, 150 U. S. 118, 121 (1893). Indeed, the following passage from *Graves* was recently quoted with approval by this court in *United States* v. *Restaino*, 369 F.2d 544, 547 (3d Cir. 1966):

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that

the testimony, if produced, would be unfavorable." 150 U. S. at 121.

Accord, *Brown* v. *United States*, 414 F.2d 1165, 1166 (D. C. Cir. 1969).

Borg-Warner also argues that the missing witness charge should have contained specific references to those witnesses to whom it would be applicable and should have explained the prerequisites to its application more fully. On this record, however, we cannot say that the trial judge abused his discretion in charging as he did. Finally, Borg-Warner seems to suggest that the instruction could not be applied to it because unlike the other defendants, "[c]ounsel for Borg-Warner did not suggest to the jury that they should infer from the government's failure to call a particular witness that that witness's testimony would have been adverse." However, we note that it is entirely clear from the record that Borg-Warner's counsel did argue to the jury that the government did not call Borg-Warner employee, Ray Bair because his testimony would have been unfavorable.

Borg-Warner also argues that it was substantially prejudiced by the trial judge's incomplete statement of its "theory of the case" in his charge to the jury. In particular, Borg-Warner emphasizes[24] that the trial judge should have specifically instructed the jury that it was relying on the testimony of government witness Morris H. Vereeke, Borg-Warner's Sales Vice President, that no price at Borg-Warner was ever established as a result of any informa-

[24] This is the only argument on this point raised by counsel for Borg-Warner in his post-charge colloquy with the trial judge. See F. R. Crim. Proc. 30.

tion obtained from price discussions with competitors. Initially, we have some doubt whether Borg-Warner's suggested instruction on this point was an accurate characterization of Mr. Vereeke's testimony. In any case, we believe that the trial judge did not abuse his discretion in selecting the evidence he commented upon in his charge. Moreover, Borg-Warner's counsel clearly emphasized his reliance on Mr. Vereeke's testimony in his lengthy summation to the jury.

CONCLUSION

The government's evidence of price fixing by the appellants was compelling. We note in conclusion that the government presented eyewitnesses and co-conspirators who clearly implicated appellants in the crime and largely corroborated one another. As to all appellants but Decker, we have concluded that there is strong evidence of their participation in all four phases of the conspiracy. When it is remembered that evidence of a defendant's participation in any one phase of the conspiracy was sufficient for a conviction under the one-count indictment, it becomes clear that the cumulative effect of the government's case was overwhelming. As to appellant Decker, there was clear and convincing evidence of his participation in the fourth phase of the conspiracy.

It is true that we have found errors in a few instances but appellants are not entitled to hindsight perfection. Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our

examination of the record in its totality that the appellants received a fair trial and that their conviction was entirely warranted from the evidence.

The judgments of conviction will be affirmed.

Judge Aldisert joins in this opinion insofar as it applies to the appellants, American Standard Inc., in No. 18,182; Borg-Warner Corporation in No. 18,184; Joseph J. Decker, in No. 18,185; and Daniel J. Quinn, in No. 18,186.

ALDISERT, *Circuit Judge*, Dissenting in Appeal Numbers 18,183 and 18,187.

I would grant a new trial to Kohler Company, Appellant in No. 18,183, and Norman R. Held, Appellant in No. 18,187, because of what I consider improper and inflammatory conduct by the government attorney in the cross-examination of witness Held. This was fairly described in the majority opinion as references to "Kohler's purchase of guns, ammunition and tear gas, eviction of strikers, investigating the private lives of union officials, and other inflammatory topics."

The majority admit that "its potential for prejudice outweighed its evidentiary value," but conclude that because this incident occupied only one hour's time in a total of sixteen weeks it could not have affected the jury so as to deny a fair trial to these appellants. I disagree. I consider the improper cross-examination to possess a more sinister capacity.

Admittedly, what is posed is a close question. My brethren and I are in disagreement only as to where we place this error. I believe that it crosses the line and

becomes so prejudicial as to justify the ordering of a new trial for these two defendants.

Even viewed from the most charitable vantage point, there was scant justification for the type of cross-examination, persisted in by the government and permitted to continue by the trial judge over the converted objection of all defense counsel. Its ostensible claim to legitimacy, according to the trial judge, stemmed from a challenge to the credibility of the witness Held. But even here, it is most difficult, if indeed at all possible, to localize the specific statements in his brief rendition of the Kohler history which form the basis for the prolonged attack.

On direct examination he described early Kohler history, an account that ended in 1955. In response to the first question on cross-examination relating to the company's labor relations policies, he stated—and this is not challenged—that he was not in Kohler, Wisconsin, from 1954 to 1960, the years of the strike there. Yet, he was subjected to a continuing barrage of "did-you-know" questions relating to a bitter chapter in industrial warfare, the facts of which, concededly irrelevant to the substantive issues of antitrust violation, were never presented testimonially other than from the questions of government counsel, and all of which had an explosive capacity for inflaming a Pittsburgh, Pennsylvania, jury.

Moreover, an examination of excerpts of this cross-examination set forth in the margin[1] discloses that it con-

---

[1] Q. How were they between 1954 and 1960, Mr Held?
A. Well, first of all, I can't answer firsthand 1954 to 1960, because I was not on the scene.
Q. Mr. Held, I asked you a question. Is it not a fact, sir, between 1954 and 1960 Kohler Company engaged in one of the longest and bitterist strikes in American history?

cludes with the astonishing statement of the government attorney: "And you understand . . . that the questions which I have directed to you have absolutely nothing to do with any charge of the indictment that you have violated the law between 1962 and 1966?"

A. Well, I wouldn't characterize it that way. I will agree with the length, but I won't agree with the bitter. Also involved here was an auto workers union which had a contract that was geared to the production of automobiles. We are bathtub producers, that type of contract wouldn't work.

Q. Then, you have no reason to buy guns and ammunition, do you, to break a strike?

A. I don't know of any guns or ammunition.

Q. Oh, you didn't know, sir, that during the course of the National Labor Relations Board hearings that Kohler Company was denounced for preparing for bargaining during the strike by purchasing guns, ammunition and tear gas?

• • •

A. Of my own knowledge, sir, I did not know.

• • •

Q. Do you know, sir, that in 1960 the National Labor Relations Board denounced your company for a number of unfair practices and that these practices included paying for and accepting from private detective agencies certain reports suggesting the possibility of bugging the union's hotel rooms during the course of the National Labor Relations Board hearing?

A. No, sir.

• • •

Q. Are you aware, sir, that in 1960 the National Labor Relations Board criticized Kohler Company for such practices among which were paying for and accepting from private detectives certain telephone checks and long distance calls from union headquarters?

A. No, I am not.

Q. Are you aware, sir, in the same hearing in 1960, that the same National Labor Relations Board denounced Kohler Company for hiring private detectives in that they investigated into the private life of the union's chief negotiator.

Opinion of the Panel of the Court of Appeals

For the government to perpetrate and prolongate this clashing examination and then say that it had "absolutely nothing to do with any charge of the indictment" raises the serious question of the very real purpose of the examination. It is particularly significant that the trial was held

together with the investigation of three international union officials?

• • •

Q. Mr. Held, did I not ask you more than ten minutes ago whether or not you read the hearings and the opinion of the National Labor Relations Board, and did you not answer, "Yes, but that was a long time ago"?

• • •

Q. Certainly, sir. In the same 1940 opinion of the National Labor Relations Board, are you aware, sir, that, in their opinion, criticism was leveled against Kohler Company because of the submission of a formal detailed plan calling, in part, for a system of secret plant informants and a comprehensive investigation of all new employees?
A. No, I am not aware of that.

• • •

Q. Do you know, sir, whether or not the United States Court of Appeals found that Kohler Company engaged in anti union espionage during the strike?
A. I don't know. I can't answer that without reference.

The chambers conference was then held at which time the court was advised by counsel, "The course of inquiry which the government has chosen to pursue into this matter has not been into a logical examination of what probative value, if any, this matter might arguably have. But, it has been to select certain fragmentary details from the reported decisions of the National Labor Relations Board; and by the Court of Appeals for the District of Columbia, about the various legal proceedings which resulted from that strike, and to take those details which are most likely to inflame and prejudice the jury, and to make it impossible for them to act in a calm and dispassionate manner with respect to the issues in this case." After a lengthy chambers conference, represented by twenty-one pages of the court record, the government attorney resumed the cross-examination the next day:

in the Western District of Pennsylvania, a community historically and currently the center of organized labor activity. With a jury drawn from this philosophical environment, the potential for prejudice following an hour long injection of collateral labor-baiting activities into an anti-trust prosecution cannot be minimized.

My difference with the majority going only to the effect of this admittedly improper cross-examination, it does not become necessary to rehearse at length the appropriate principles of law.

I have concluded that the examination was designed to and did create an abhorrent image of these appellants. *United States* v. *Beno*, 324 F.2d 582 (2 Cir. 1963), and did degrade them in the eyes of the jury. *United States* v. *Provenzano*, 215 F.2d 531 (2 Cir. 1954).

Q. You will recall yesterday afternoon that you were asked certain questions concerning Kohler's strike which occurred between 1954 and 1960. Do you recall that, sir?

A. Yes, sir.

Q. Did Kohler, as a company, ever own any of the homes in which the workers lived?

A. On occasions for short periods of time, as I recall. I would have definite information on that, Mr. Fricano [government counsel].

* * *

Q. And when the strike occurred, sir, Kohler Company served eviction notices on the strikers, didn't it, and actually evicted some of them from company-owned houses and from the hotel?

The cross-examination continued for ten additional pages of court record until the final statement by government counsel:

Q. And you understand, of course, do you not, Mr. Held, that the questions which I have directed to you along these lines have absolutely nothing to do with any charge in the indictment that you violated the law between 1962 and 1966?

Opinion of the Panel of the Court of Appeals

Traditionally, this circuit has been most zealous in prohibiting the introduction of collateral matters in a criminal prosecution. In *United States v. Jacangelo*, 281 F.2d 574 (3 Cir. 1960), Judge Hastie declared that "admission of evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged." In our recent case of *United States v. Shartzer*, F.2d (3 Cir. No. 17,747, 1970), passing reference to the defendant's criminal record was held not to be reversible error solely because "it was not emphasized and was in a sense oblique." We said: "With this we are in accord albeit somewhat reluctantly. But the prosecuting attorney should not have been permitted to read that portion of the statement proving Shartzer's prior conviction and the Trial Judge should have prevented such an occurrence. If it were not for the peculiar circumstances surrounding this incident we would hold it to be reversible error."

I believe that an improper cross-examination of at least one hour's duration, which persisted beyond an overnight recess, must be considered as more than an oblique reference irrespective of the length of the trial.

Because I would remand for a new trial as to them, I would also hold that the Beckman charts supporting the oral testimony of Dr. Donald Beckman should be admitted, as well as Kohler Exhibit 132.

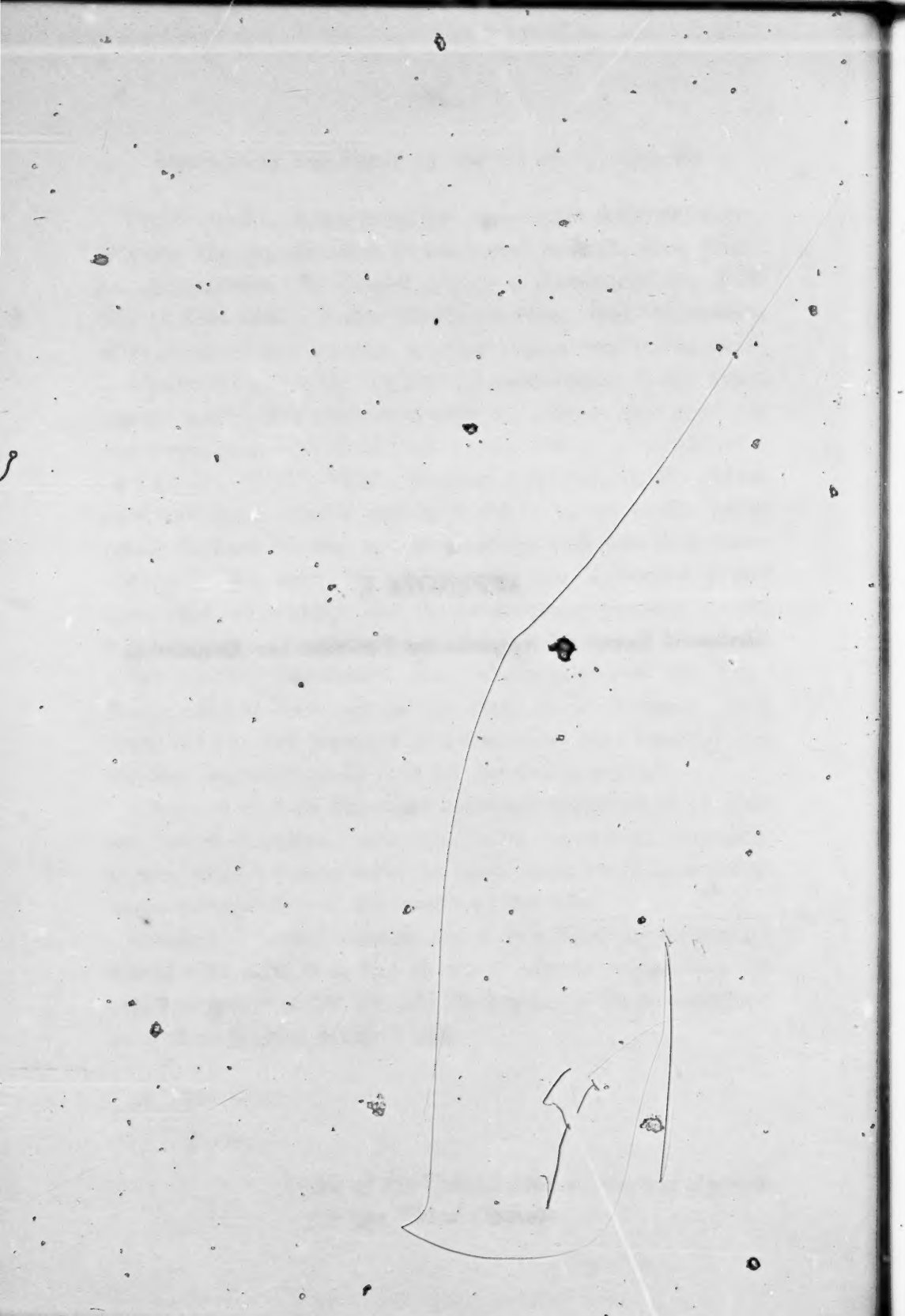
A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[redacted]

[redacted]



APPENDIX E

Order of Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 18,182 to 18,187, inclusive

United States of America vs. *American Radiator & Standard Sanitary Corporation*, et al.

American Standard, Inc.,	Appellant in No. 18,182
Kohler Company,	Appellant in No. 18,183
Borg-Warner Corporation,	Appellant in No. 18,184
Joseph J. Becker,	Appellant in No. 18,185
Daniel J. Quinn,	Appellant in No. 18,186
Norman R. Hall,	Appellant in No. 18,187

(D. C. Criminal No. 66-295)

Sur Petition For Rehearing

Present: Hastie, *Chief Judge*, and Seitz, Aldisert, Gibbons, *Circuit Judges*, and Higginbotham, *District Judge*.

The petitions for rehearing filed by Appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

Order of Court of Appeals on Petition for Rehearing

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Chazen J. Senn
Circuit Judge

Dated: November 3, 1970

[redacted]

APPENDIX F

Constitutional Provisions and Statutes

CONSTITUTION OF THE UNITED STATES

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 28 U.S.C.

§ 1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so

reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. June 25, 1948, c. 646, 62 Stat. 945; Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Pub.L. 87-183, 75 Stat. 413.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1047

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1048

BORG-WARNER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1049

NORMAN R. HELD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1050

KOHLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–72a [1]) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1970, and petitions for rehearing were denied on November 3, 1970. The petitions for writs of certiorari were filed on December 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in affirming jury verdicts convicting petitioners of participation in an antitrust price-fixing conspiracy, the court of appeals applied the proper standard of appellate review.

2. Whether petitioners' right of confrontation under the Sixth Amendment was violated by application of the federal co-conspirator exception, and other well-recognized exceptions, to the hearsay rule.

3. Whether the court of appeals correctly held that cross-examination of petitioner Held concerning the

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[1] The court's opinion appears identically at pages 1a–72a in the appendices of the petitions in Nos. 1048, 1049, 1050. It also appears at Pet. App. No. 1047, 7a–78a. For convenience, the United States will use the text of the opinion set forth in Nos. 1048, 1049 and 1050 and refer to this simply as "Pet. App."

As used herein "J.A." refers to the four-volume Joint Appendix to the main briefs in the court of appeals. "E" refers to the three-volume "Exhibits to Joint Appendix"; "T" refers to the trial transcript.

1954 strike against Kohler Company did not constitute prejudicial error as to Held and Kohler, when considered in the context of the entire trial, and the strength of the government's case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution provides:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *.

Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of the title to be illegal shall be deemed guilty of a misdemeanor * * *.

STATEMENT

On October 6, 1966, a grand jury returned a single count indictment charging eight corporations, eight high-ranking employees of those corporations and a trade association with conspiring to fix the prices of enameled cast iron and vitreous china plumbing fixtures, in violation of Section 1 of the Sherman Act

(Pet. App. 2a–3a).[2] The indictment stated that at meetings held in several cities the defendants agreed to raise prices on enameled cast iron and vitreous china plumbing fixtures, to limit the maximum allowable discounts on those fixtures, and to discontinue the production of regular enameled cast iron fixtures, leaving production only of higher-priced acid resistant fixtures; and that the defendants had carried out their agreement (Pet. App. 2a–4a).

Eleven of the seventeen defendants pleaded *nolo contendere* and were sentenced on their pleas (Pet. App. 5a). The petitioners chose to stand trial. After a sixteen-week jury trial, all six petitioners were convicted (Pet. App. 5a–6a). The court of appeals affirmed (Pet. App. 66a).[3]

The conspiracy consisted of four phases, interrelated as to timing and participants, yet possessing sufficient distinctiveness to merit separate discussion.

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[2] The defendants other than the petitioners were Crane Company and its vice-president, Robert Casner; Universal-Rundle Corp. and its vice-president, Stanley Backner; Rheem Manufacturing Co. and its vice-president, Robert Pierson; Wallace-Murray Corp. and its president, John Balmer; Briggs Manufacturing Company; George Kelch, President of petitioner Borg-Warner's Ingersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA) (Pet. App. 2a–3a).

[3] The affirmance was unanimous as to petitioners American Standard, Borg-Warner, Decker, and Quinn. Judge Aldisert dissented from the affirmance of the convictions of Kohler Company and Held. All the affirmances were as to all aspects of the conspiracy except for petitioner Decker; as to him, the court of appeals affirmed on a finding of sufficient evidence regarding the conspiracy to eliminate regular enameled fixtures, and did not decide the sufficiency question regarding other aspects of the conspiracy.

A. THE AGREEMENT TO INCREASE BATHTUB PRICES

In October and November, 1962, the seven defendant corporations producing enameled cast iron plumbing fixtures all published identical, increased prices on high volume enameled cast iron bathtubs (Pet. App. 8a).[4] This uniform price increase was the direct result of an agreement reached by the sales officials of the corporations in a meeting held on September 17, 1962, at petitioner Quinn's room at the Sheraton-Chicago Hotel (Pet. App. 8a). Petitioners Quinn and Held were there, as was defendant Kelch of Borg-Warner; high-ranking officials of Crane, Universal-Rundle, Rheem and Wallace-Murray also participated (Pet. App. 8a–9a). As the court of appeals noted, "[t]here was substantial 'eyewitness' testimony concerning price discussions and agreements at this gathering" (Pet. App. 9a).

For example, Mr. Callanan, who had participated in the meeting for Rheem, testified not only that there had been a discussion of specific bathtub prices, but also that there had been agreement as to what the new prices would be.[5] Similarly, Mr. Cannon of Wallace-

[4] All seven corporations published new special prices, which quoted prices applicable to purchases of high-volume staple items in accord with certain specified conditions. The bathtubs involved in this phase of the conspiracy were such items. (Pet. App. 8a).

[5] "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?

"The Court: If anything.

"The Witness: The prices as reflected in my bulletin of November 2, 1962 [which were identical to the prices of all the other manufacturers], were the prices that I came out of that room with that understanding." (Pet. App. 9a).

Murray reported to his superior of the Sheraton-Chicago agreement that there had been a discussion of prices and "* * * that there was a tentative agreement to increase prices * * *." (Pet. App. 10a).

B. THE AGREEMENT TO MAINTAIN AND INCREASE THE PRICES OF VITREOUS CHINA PLUMBING FIXTURES

The conspirators who met in petitioner Quinn's hotel room on September 17, 1962, were not only concerned with raising bathtub prices; they also wanted to put into effect a general increase in the prices of vitreous china fixtures. They agreed that higher prices were a necessity, but they feared that an increase at that time would not hold if the "short-line" manufacturers[4] kept their prices at current levels (Pet. App. 11a–12a). However, on November 20, 1962, petitioners Quinn and Held, along with Kelch of Borg-Warner and high-ranking officials of Crane and Rheem, met at the Shoreham Hotel in Washington (Pet. App. 12a). Rheem's vice-president, Pierson, testified that Casner of Crane announced that Crane would soon raise prices to a specific level. Discussion of these prices followed and, according to Pierson, "It was my opinion when I left that people probably would follow the lead of Crane in some form or another" (Pet. App. 13a).

Crane did announce a 7 percent across-the-board in-

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[4] In the trade, a "short-line" manufacturer is one that produces only the most commonly used vitreous china fixtures. Petitioners American Standard, Kohler and Borg-Warner (and all the other indicted corporations except Briggs) were "full-line" companies.

crease on all china fixtures on January 14, 1963. Shortly thereafter all the indicted corporations except Borg-Warner raised their prices to the level of Crane's (Pet. App. 13a).[7] The conspirators, fearing that this increase would not hold firm, met at the Waldorf-Astoria Hotel in New York on February 7, 1963, "* * * to try to maintain the new prices" (Pet. App. 13a). Petitioners Decker, Quinn, and Held were present, as were Kelch of Borg-Warner and several other high-ranking sales officials (Pet. App. 13a–14a). Bonnett of Wallace-Murray testified that the men discussed new china prices and that petitioner Quinn stated that "* * * the general consensus was that the new prices would—we would try to maintain the new prices" (Pet. App. 14a). Five days later, Borg-Warner raised its prices to conform with those of the other conspirators.

C. THE AGREEMENT TO LIMIT MAXIMUM DISCOUNTS FROM WHOLESALER NET PRICES

The conspirators further agreed that they each would limit the discounts from wholesaler net prices to a maximum of 15 percent for enameled cast iron and 20 percent for vitreous china fixtures (Pet. App. 15a). Once again, agreement was reached at the September 17, 1962, meeting at Quinn's Chicago-Sheraton

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[7] Briggs had had no representative at the Shoreham Hotel meeting, but it increased its prices only after its vice-president, Betz, had discussed the price increase with Crane officials and agreed to raise its prices to the agreed levels. (Pet. App. 13a).

hotel room. Once again, the proof of agreement came from eyewitness testimony. Callanan of Rheem testified that he came away from the meeting "of the opinion that other people would be using the same structure" (Pet. App. 16a). The "other people" were the "other members who were in the room that evening," and the "structure" was "[f]ifteen per cent on iron and twenty per cent on china" (Pet. App. 16a). Cannon of Wallace-Murray confirmed these percentages in his testimony; he noted that in the discussion he had agreed to verify actual prices quoted from his competitors, in order to prevent building contractors from playing off one manufacturer against another and getting a better discount than the 15 percent and 20 percent allowed (J.A. 27a; 292a–294a). When the conspirators met on February 7, 1963, at the Waldorf-Astoria Hotel, they reaffirmed their earlier agreement to limit discounts. Bonnett of Wallace-Murray testified that petitioner Quinn reported to him that there had been a discussion of discounts and a "tentative discussion or agreement" to limit the discounts to 15 percent on cast iron and 20 percent on vitreous china (Pet. App. 16a–17a). Bonnett assured Quinn that his company "would try to adhere to those discounts" (Pet. App. 17a).*

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*Bonnett, upon returning to Pittsburgh, instructed his subordinate Cannon not to discount from wholesaler net prices more than those percentages on those products (J.A. 305a–306a).

D. THE AGREEMENT TO ELIMINATE REGULAR ENAMELED CAST IRON PLUMBING FIXTURES AND TO INCREASE THE PRICES OF ACID RESISTANT FIXTURES

Another aspect of the conspiracy was the agreement to stop production of regular enameled cast iron fixtures and impose an increased price structure on the acid resistant fixtures which would remain in production. Regular enameled cast iron fixtures were important to the conspirators' business. They accounted, for example, for more than $20,000,000 in gross annual sales at American Standard (Pet. App. 17a). Competition from steel and plastic fixtures, both of which are acid-resistant, was intense (Pet. App. 17a). In order to implement an industry decision to discontinue so fundamental a line of fixtures, however, strong protective cover was needed (JA 507a, 479a–482a). The device selected was to change the Enameled Cast Iron Plumbing Fixtures Commercial Standard by having it provide for acid-resistant finish only, and then cite the revision to justify discontinuation of regular enamel. Publication of the revised standard would also serve as the signal for the defendants' scheme to become operational (JA 470a–472a, 403a, 405a, 418a; 394a–395a).*

The conspirators agreed upon the elimination of regular cast iron and the new prices for acid resistant cast iron at a meeting on March 28, 1963, in Quinn's

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*The Commercial Standard is a recorded voluntary standard of the trade published by the U.S. Department of Commerce (E 158). Since the standard is purely voluntary, it could not require the conspirators to discontinue the use of regular enameled cast iron fixtures.

room at the Palm Beach Biltmore Hotel (Pet. App. 18a).[10] Pierson of Rheem testified that petitioners Quinn, Decker and Held were present, as were Keleh of Borg-Warner and several other key officials of other corporations (Pet. App. 18a). Pierson testified most explicitly of this meeting:

> A. The discussion resolved [sic] around the specific timetable that would occur in this change from—in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.
>
> Q. Were specific prices mentioned during the course of this meeting?
>
> A. Yes.
>
> * * * * *
>
> Q. What was decided at this meeting, if anything, Mr. Pierson?
>
> A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.* [Pet. App. 18a–19a; emphasis added by court of appeals.]

As the court of appeals found, Cannon of Wallace-Murray confirmed Pierson, testifying that the participants had discussed the "proper philosophy" of pricing in the new all acid-resistant market and that they had decided upon certain prices (Pet. App.

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[10] The record shows that the conspirators had frequently discussed the need to eliminate regular enamel and to restructure the prices of acid-resistant enamel before: at the Sheraton-Chicago meeting in September, 1962 (JA 371a, 554a–555a, 477a–478a); at meetings at the Shoreham Hotel in November, 1962 (JA 435a–436a, 442a–444a, 458a–459a; E4); at the Americana Hotel in New York (JA 376a–377a).

19a). Callanan also confirmed the price discussion and the specificity of the prices selected (Pet. App. 19a). He also testified that "There was a general discussion that the timing of the thing would tie in with the issuance of Commercial Standards" (JA 368a–369a)."

In order to reaffirm their Palm Beach agreement, the conspirators met two months later at the Airport Hotel in Pittsburgh on May 15, 1963 (Pet. App. 20a). Becket, Quinn, and Held were present, as were Keleh of Borg-Warner and officials of Crane, Wallace-Murray, Rheem, and Universal-Rundle (Pet. App. 20a). Bonnett of Wallace-Murray testified that they discussed specific prices and that "It was my understanding when I left the meeting that the prices would generally be on this level" (Pet. App. 20a). The somewhat general nature of the discussion was due to the fact that this meeting was to reaffirm the decision taken earlier at Palm Beach. As Cannon of Wallace-Murray testified, at the time of the Pittsburgh meeting he already knew the price structure to be announced in July and August of that year (JA 403a).

The conspirators held a final, confirmatory meeting in Quinn's room at the Waldorf-Astoria Hotel on

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" The purported justification for removing non-acid-resistant enamel from the Commercial Standard was that it was no longer an industry-wide item. The PFMA Enameled Cast Iron Standards Committee so stated on February 7, 1963 (E328 ¶ 5). As the defendants themselves admitted at trial (JA 553a–554a, 556a, 478a, 516a, 391a–392a), this representation was untrue. In turn, the Commerce Department on June 7, 1963, issued a new, revised standard (effective July 10, 1963) that "for the first time made acid resistant cast iron enamel fixtures the industry standard" (Pet. App. 17a–18a).

June 26, 1963 (Pet. App. 20a). In the words of Pierson, who attended, there was "a general review of the proposed plan on this product line and the pricing that was related thereto" (Pet. App. 20a). A copy of the announcement that American Standard intended to issue concerning the changeover and the new prices was discussed by the group (Pet. App. 20a–21a). On July 1, 1963, American Standard made this announcement public: within two months all the other indicted cast iron manufacturers had announced their discontinuance of regular enameled cast iron fixtures and new, higher prices for acid resistant fixtures (Pet. App. 18a).

The court of appeals stated: "The government's evidence of price fixing by the appellants was compelling * * * the cumulative effect of the government's case was overwhelming" (Pet. App. 65a–66a). As the court noted, the government's case largely relied on the consistently incriminating eyewitness testimony of the petitioners' own co-conspirators (Pet. App. 66a), and showed an extensive and successful conspiracy to fix prices on enameled cast iron and vitreous china plumbing fixtures.

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW

In many respects this is a typical antitrust criminal conspiracy case: there are several defendants, the trial consumed sixteen weeks, and the record of trial runs to more than 10,000 transcript pages and 900 exhibits.

In at least one respect, however, this case is decidedly atypical. Here, the government's proof rested not primarily on inferences to be drawn from circumstantial evidence of parallel business behavior but on direct testimony of witnesses who were themselves participants in illegal price discussions and agreements. The appropriate standard for appellate review in this type of case was long ago established by this Court: where the evidence against the defendants is strong, jury verdicts will not be reversed for errors unless the reviewing court is persuaded that misconduct of the trial prevented the jury from determining the case on a dispassionate consideration of the evidence. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240. See also *Glasser* v. *United States*, 315 U.S. 60, 83.

The court of appeals correctly applied this standard in discharging its difficult review function here. To be sure, it found and identified errors; total absence of error in a lengthy and hard-fought trial of this magnitude and complexity would be surprising indeed. But after a painstaking review of the entire record, and thorough consideration of all the many issues raised by petitioners here, the court concluded that:

> Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction

was entirely warranted from the evidence. [Pet. App. 66a] [12]

This conclusion was in full conformity with the court's duty under the federal harmless error statute.[13] It is true that the court spoke of the strength of the government's case; indeed the court found the government's proof "overwhelming" (Pet. App. 65a). But the court made plain that it had viewed "the record in its totality"; under the doctrine of harmless error an appraisal of the strength of the government's case is essential. Even error of constitutional scope—and there was no such error in this case—may be harmless in the face of overwhelming government proof. *Harrington* v. *California*, 395 U.S. 250, 254. *A fortiori*, overwhelming government proof may render ordinary error harmless.

We submit that petitioners had a full and fair trial, and that the claims they seek to present here were fully considered and correctly rejected by the court below under the appropriate standard of review.

II. THERE WAS NO VIOLATION OF THE PETITIONERS' SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Petitioners request this Court to declare the co-conspirator hearsay exception a denial of the right of

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[12] Except as to petitioners Kohler Co. and Held, and with reference to only a single issue to be discussed *infra*, this determination was unanimous.

[13] 28 U.S.C. 2111: "On the hearing of any appeal * * * the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

confrontation (Pet. No. 1047, 15–16). The co-conspirator exception to the hearsay rule has been part of federal law for well over a century. *United States* v. *Gooding*, 12 Wheat. 460. As the court of appeals observed, this Court has held it not to be a violation of the Sixth Amendment. *Lutwak* v. *United States*, 344 U.S. 604. See, also, *Clune* v. *United States*, 159 U.S. 590; *Delaney* v. *United States*, 263 U.S. 586.

Petitioners do not dispute this precedent, but they claim that the co-conspirator hearsay exception is "in conflict with the rationales" of *Bruton* v. *United States*, 391 U.S. 123, and *Evans* v. *Dutton*, 400 F. 2d 826 (C.A. 5) (Pet. No. 1047, 15). But *Bruton* expressly did not involve the co-conspirator exception to the hearsay rule, 391 U.S. 123, 128, n. 3, and this Court, since the instant petitions were filed, has reversed the Fifth Circuit's decision in *Dutton* v. *Evans*, 400 U.S. 74.

In *Dutton* v. *Evans*, *supra*, the Court held that Georgia's co-conspirator exception to the hearsay rule was not a violation of appellee's right of confrontation under the Sixth and Fourteenth Amendments. While the validity of the federal evidentiary rule was not in issue, 400 U.S. at 82, the federal rule is considerably more restrictive of co-conspirator hearsay than the Georgia rule whose application to Evans was held constitutional.

Moreover, looking to the impact of the co-conspirator hearsay admitted in this case, one is struck by its insignificance. The court of appeals, after a thorough

examination,[14] concluded that the instances in which declarations of a co-conspirator who did not testify were received "amounted at best to a handful * * *. The sum of its weight was extremely small and insignificant when the record is considered as a whole" (Pet. App. 38a). Any confrontation issue in this case is raised in a context of harmless error beyond a doubt. See *Dutton* v. *Evans, supra; Harrington* v. *California, supra; Lutwak, supra.*

B. There is no merit to the contention (Pet. No. 1047, 16–17) that the decision of the court below conflicts with decisions of the Sixth and Ninth Circuits. In both *Townsend* v. *Henderson,* 405 F. 2d 324 (C.A. 6) and *O'Neil* v. *Nelson.,* 422 F. 2d 319 (C.A. 9), certiorari granted, No. 336, O.T. 1970, November 9, 1970, confessions of one co-defendant, made while in police custody[15] and incriminating to another co-defendant, were received in violation of the rule of *Bruton* v. *United States,* 391 U.S. 123. The question before the courts of appeal in each of those cases was whether

[14] Petitioners' contention that the court of appeals rejected their confrontation claims "[w]ithout particularized analysis of the evidence in question" (Pet. No. 1047, 15) is inaccurate. As the court's opinion makes clear (see, *e.g.*, Pet. App. 37a, 38a), the court examined the record with care in considering the confrontation issue and with little assistance from petitioners, who "have made little attempt to document their claim by specific page references to the record" (Pet. App. 37a, n. 15). Petitioner's contention (Pet. No. 1047, 16, n. 1) that co-conspirator hearsay was the only evidence of Quinn's agreement to fix china prices prior to American's January 1963 increase is inaccurate. See Pet. App. 17a–21a.

[15] The disputed declaration in *Townsend* was made to a prison official while the declarant was kept in solitary confinement, and was held to be an involuntary confession. *Id.* at 327–328.

the constitutional error in the prosecution's admitted violation of *Bruton* was cured by the opportunity which each appellant had at trial to cross-examine the co-defendant. Since in each instance the co-defendant denied ever making the confession, the courts of appeal held that cross-examination was not useful and the *Bruton* error loomed too large to be harmless. *Townsend* v. *Henderson*, 405 F. 2d at 328–329; *O'Neil* v. *Nelson*, 422 F. 2d at 321–322.

By contrast, the testimony to which the petitioners now object was fully admissible against all the defendants under well-developed rules of evidence and decisions of this Court. Bonnett on direct related his conversation with Quinn in a Waldorf-Astoria hotel room; Quinn told him that he and the other conspirators had agreed to limit discounts (JA 302a–303a). This declaration was admissible against Quinn as an admission by a party, see Wigmore on *Evidence* (3d Edition), § 1048, and against his co-conspirators under traditional principles approved by this Court. *Supra*, p. 15.[16]

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[16] Petitioners' observation (Pet. No. 1047, 16) that Quinn denied this conversation with Bonnett is in essence a complaint that the jury chose to believe Bonnett, not Quinn. Petitioners' contention (Pet. No. 1047, 16, n. 2) that "prosecution witnesses were allowed to give opinion evidence without being able to recall the facts upon which their opinions were based" is without merit. Of the four witnesses to whose testimony petitioners refer, two (Quinn and Held) were *defense* witnesses; the other two, Callaman and Pierson, dealt in specifics and were subject to vigorous cross-examination. See, for example, JA 215a–224a; 228a–229a.

C. Petitioners' contention that the admission of the HCA (or Pape) notes denied their Sixth Amendment right to confrontation (Pet. No. 1047, 10–14) is unfounded. These notes, (E168–178) written by Raymond Pape on stationery of the Hotel Corporation of America ("HCA"), were found stapled together in the files of Crane Co., Pape's employer and a defendant (Pet. App. 31a). The HCA notes "echoed figures and statements" which Quinn had written on an internal American Standard worksheet dated March 1, 1963 (Pet. App. 37a; E146). These two documents were part of the government's proof that the conspirators had met on March 28, 1963, at the Palm Beach Biltmore (an HCA hotel) and had agreed on the basis of American Standard's projections, to eliminate regular enamel and fix prices on acid resistant enamel (Pet. App. 30a). Pape, the author of the notes, was seriously ill with heart disease at the time of the trial—indeed he died of heart failure shortly after the trial—and accordingly, although he was technically available to testify, the government promised not to call him if it could possibly avoid doing so (Pet. App. 31a, n. 11). The United States did not call Pape as a witness but introduced his notes instead.

The main argument[11] petitioners now advance is that the confrontation clause requires the government

[11] Petitioners also contend that in upholding the admission of the notes the court of appeals "* * * erroneously equated the right to confrontation with the hearsay rule contrary to this Court's express rejection of such an equation in *California* v. *Green*, 399 U.S. 149 (1970)" (Pet. No. 1047, 14). The

to produce a witness to testify to any fact, so long as it is incriminating and so long as the witness is literally available (Pet. No. 1047, 14). Such a position, which would exclude on constitutional grounds virtually all extra-judicial declarations of an available witness, was not accepted by this Court in *California* v. *Green*, 399 U.S. 149,[18] and is inconsistent with the recent decision in *Dutton* v. *Evans*, 400 U.S. 74. In *Dutton*, declarant was available to testify, though he probably would have claimed the privilege against self-incrimination. The prosecution did not call him to the stand and used instead a hearsay declaration; this Court found no violation of the defendant's right to confrontation. Here the government introduced Pape's written notes without calling him as a witness to avoid dangerous strain upon a man in demonstrably precarious health.[19]

Finally, we note, the Pape notes related only to the fourth aspect of the conspiracy. Even if one assumes

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court of appeals did not make such an equation. The court did hold that the notes were not hearsay (Pet. App. 38a–39a), but only in response to petitioners' arguments below that they were (Pet. App. 37a–38a). The rejection of this argument, made briefly again in this Court (Pet. No. 1047, 12), was correct. See, *e.g.*, McCormick, *Evidence* (1954), 463–466.

[18] Mr. Justice Harlan advanced a related, but less sweeping position, bottomed on due process grounds, in *California* v. *Green*, *supra*, at 186–187 (concurring). He has now rejected this prior view. *Dutton* v. *Evans*, 400 U.S. 74, 93 (concurring).

[19] Petitioners, of course, could have called Pape had they thought his testimony would be useful to them. He was, after all, an executive of a co-defendant corporation. Presumably they feared the impact of his testimony, or else they recognized what the government earlier recognized: that a man this sick should be spared the ordeal of testifying if it could possibly be done.

they pertained to some other time or place than the Palm Beach meeting, proof of the other three aspects of the conspiracy remains unimpaired. The notes would nonetheless remain cogent and proper proof of American Standard's participation in this aspect of the conspiracy. And the remaining proof *e.g.*, pp. 9–12, *supra*, would be more than adequate to establish the complicity, as well, of the other defendants.

D. The essentially related claim that the prosecutor violated his duty under *Brady* v. *Maryland*, 373 U.S. 83, by failing to produce the transcript of Pape's grand jury testimony before trial (Pet. 1047, 19–20; Pet. 1048, 7–11; Pet. 1049, 13–18) is unsound. Although petitioners filed a blanket, pretrial motion for production of "all material helpful or exculpatory" to them (J.A. 25a), the motion was withdrawn upon the prosecutor's assertion that he was aware of no such material in his possession. Never during trial did petitioners indicate specific interest in the Pape transcript. Never was the trial judge asked to review the prosecutor's judgment that this or any other document was not subject to production under *Brady*.

In their opening brief on appeal, petitioners asserted for the first time that introduction of Pape's notes without putting Pape on the stand suggested that Pape's grand jury testimony had been suppressed to conceal inconsistencies between it and the government's theory of authorship and significance of the notes. The government is satisfied that the transcript was not producible under *Brady*; we be-

lieve, moreover, that appellants gave up their right to make the claim on appeal by not affording the trial judge an opportunity to pass on their contentions in the first instance. Nevertheless, we voluntarily produced the transcript to appellants and to the court of appeals, in order to help rebut sweeping allegations of prosecutor misconduct.

Petitioners briefed and argued below their claim, renewed here, that isolated passages of the transcript contained arguably exculpatory material. The court of appeals, after consideration of the entire transcript, fully vindicated the prosecutor's judgment. It had little trouble concluding that Pape's testimony was "extremely incriminating" and contained no "material exculpatory evidence" (Pet. App. 54a). Under these circumstances it cannot be said that the prosecutor and the court below misconceived the prosecutor's responsibility under *Brady* v. *Maryland*.

III. THE DECISION BELOW CREATES NO CONFLICT AMONG THE CIRCUITS REQUIRING RESOLUTION NOW BY THIS COURT

Petitioner American Standard contends (Pet. No. 1047, 20–22) that the decision below "reflects" a conflict among the circuits concerning the proper interpretation of 28 U.S.C. 1732(a) and the weight to be given by a jury to a defendant's statements at trial and at the time he committed the crime. These contentions are erroneous.

A. American Standard offered as evidence internal company correspondence and memoranda containing

information from its field offices regarding the prices supposedly charged by its competitors (Pet. App. 42a). The trial court, however, rejected the company's claim that these were "business records" within the meaning of 28 U.S.C. 1732, and it excluded them as hearsay (Pet. App. 43a). The court of appeals sustained this ruling, holding that the reports were primarily based on information from "sources whose trustworthiness could not be ascertained from the documents themselves" and that American Standard was often not a party to the transactions that the exhibits concerned (Pet. App. 43a).[20]

In so holding, the court relied on *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (C.A. 9), certiorari denied, 356 U.S. 975. The court said that it was "not inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 148 (6th Cir. 1960)" (Pet. App. 43a). A careful reading of *Continental Baking*, however, reveals that the Sixth Circuit did not dispute or reject *Moore*. Rather, it distinguished that case as having been "predicated" on the lack of showing of a regular procedure for transmittal of the disputed reports about competitors; in the

[20] The court's judgment that these particular documents were untrustworthy was well grounded in fact. These "business records" were punctuated with rumors and unsubstantiated reports from undisclosed sources. See, for example, the gossipy nature of AS 61, 66, or 88 (American Standard Exhibits). Furthermore, American's own district manager, O'Connell, admitted that he received reports which contained incorrect information (T. 6066) and that he forwarded reports of competitors' activities whether or not he knew them to be true (T. 6023).

case before it, Continental "had an established policy" providing for just such transmittal. *Continental Baking Company* v. *United States*, 281 F. 2d 137, 148 (C.A. 6)."[21] In so distinguishing *Moore*, the Sixth Circuit may well have interpreted it erroneously; indeed we believe the decision below reflects a sounder reading of *Moore*. But there is no dispute among the circuits concerning the central premise of *Moore*—that documents can be admissible as business records under 28 U.S.C. 1732 only if there is a basis for reasonable assurance that the information they contain is trustworthy and reliable. Thus no substantial disagreement is presented which requires resolution by this Court.

B. The court of appeals approved a jury instruction on the weight to be given to testimony of witnesses who were defendants or officials of defendant corporations and who denied entering into the illegal agreements; the court in *United States* v. *Chas. Pfizer & Co.*, 426 F. 2d 32, 40 (C.A. 2), disapproved a similar instruction.[22] We believe that the Third Circuit was

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[21] Petitioners' citation to *Hanley* v. *United States*, 416 F.2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910, does not advance its argument (Pet. No. 1047, 21, n. 1). *Hanley* was based squarely on *Continental Baking* and its treatment of *Moore*. *Id.*, at 1168. The petition for a writ of certiorari denied in *Hanley*, No. 888, O.T. 1969, was based almost exclusively on the asserted conflict.

[22] The government has filed a petition for a writ of certiorari in *Pfizer*.

correct in this case. The instruction[23] was premised on the well-settled proposition that what constitutes an illegal "agreement" under the Sherman Act is a mixed question of law and fact. See, *e.g.*, *United States* v. *Gypsum Co.*, 333 U.S. 364, 396.

But this is not the case for resolution of any conflict there may be between the circuits. The court below correctly noted that petitioners failed to object to this instruction as given (Pet. App. 51a), and thus failed to preserve the issue for appeal. Fed. R. Crim. P. 30.

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[23] The trial court's full instruction on this point was as follows:

> You must, obviously, give due and deliberate thought to this testimony, and ultimately give to it such weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination and conspiracy as it has been given to you in these instructions, recalling among other things, that the final answer to the central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time, may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the alleged conspirators did not believe that they were violating the law or intend to commit such a violation.
>
> This is by no means to suggest to you that you overlook or reject the sworn testimony of the corporate defendants' officers. That is for your judgment, not mine. The point being made here is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you [J.A. 1954a–1955a].

IV. THE PROSECUTOR'S QUESTIONS CONCERNING THE KOHLER STRIKE DID NOT DEPRIVE THE PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL

The prosecutor opened his cross-examination of petitioner Held with some questions based upon the officially-reported findings of the National Labor Relations Board, concerning the 1954 strike at Kohler Co. Held, a Kohler vice-president and director, on direct examination had not mentioned the strike, while tracing the history of the company and emphasizing its beneficence to its workers (Pet. App. 27a).[24] The court of appeals majority held that Kohler and Held had "invited some such inquiry" (Pet. App. 27a) and that Kohler's counsel had "opened the door further" by urging that another defendant's threshold objection to the cross-examination be overruled (Pet. App. 26a, 27a).[25] The court nevertheless concluded that the trial judge should have terminated the line of inquiry prior to completion because "its potential for prejudice outweighed its evidentiary value" (Pet. App. 27a). But considering the minimal impact of a brief interlude in the lengthy trial, weighed against the strength of the government's case, the majority found that the incident did not deny petitioners a fair trial (*Ibid.*).

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[24] Kohler's counsel had foreshadowed this approach in his opening statement when he emphasized Kohler's sense of responsibility as the principal employer in the county and its devotion to full employment, even at the cost of selling at a loss (JA 1603a–1604a).

[25] Indeed, the prosecutor first sought to avoid injection of these considerations into the case by unsuccessfully objecting to the entire line of examination on direct as immaterial (Pet. App. 24a; JA 1734a).

Accepting the view of the court of appeals that the cross-examination was excessive, it was on sound ground in concluding that in the circumstances the error could not have had sufficient prejudicial effect to warrant reversal. The entire episode took at most an hour of a trial that lasted sixteen weeks (Pet. App. 27a). Equally important, this bit of cross-examination took place several weeks prior to the conclusion of the trial, and, in keeping with Kohler's request, the matter was not even adverted to in the summations or the jury charge (Pet. App. 27a). The dissenting judge conceded that "what is posed is a close question" (Pet. App. 67a). The court of appeals carefully examined the place of this brief episode in the context of the entire trial and the strength of the evidence of petitioners' guilt, and concluded that the error was harmless.[28]

V. OTHER ISSUES RAISED BY THE PETITIONS DO NOT WARRANT REVIEW BY THIS COURT

Kohler challenges the jury instruction on criminal responsibility of a corporation for the acts of its agents (Pet. 10-50, 3). The instruction, quoted at Pet. App. 59a–60a, was an accurate restatement of the law governing acts of agents within the scope of their

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[28] The claim of petitioner Borg-Warner that it, too, was prejudiced by this episode is groundless (Pet. No. 1048, 11–12). Of course, this cross-examination never mentioned Borg-Warner, nor hinted at any involvement by it in the Kohler strike. Moreover, the trial judge clearly and carefully instructed the jury that this part of the cross-examination did not involve any defendants except Held and Kohler (JA 1749a–1750a, 1766a).

authority and the course of their employment, as the court below held (Pet. App. 58a–61a). Kohler's main claim throughout these proceedings has been that its sales manager, Held, was acting beyond his authority in making price-fixing agreements with competitors, because Kohler has a firm policy against such practice (Pet. 5–6). But it is the corporation which benefits directly from such illegal activities, and for this reason it is well settled that a corporation may not insulate itself from antitrust liability merely because its agent's activities may be contrary to corporate regulations. *Standard Oil Company of Texas* v. *United States*, 307 F. 2d 120, 127 (C.A. 5); *United States* v. *Armour & Co.*, 168 F. 2d 342, 343 (C.A. 3). A contrary rule, by affording an easy means for evasion of responsibility, would seriously weaken the deterrent effect of the antitrust laws. See *United States* v. *Uniroyal, Inc.*, 300 F. Supp. 84, 95 (S.D.N.Y.).

Kohler also complains that it was denied a fair trial by the exclusion of certain documentary economic evidence (Pet. 1050, 6–8). One exhibit purported to show pricing data outside the indictment period; Kohler's own economic expert, Dr. Beckman, conceded that studies which *were* admitted formed a sufficient basis for the conclusions to which he testified (J.A. 1527a). Another excluded exhibit purported to show some 650 discounts in excess of the agreed-upon limits; this exhibit was not only misleading (Pet. App. 44a) but also cumulative in light of substantial testimony that such discounts had been granted. (*Ibid.*; J.A. 1444a, 1454a.) Indeed, the trial judge offered Kohler an opportunity to introduce the invoices which sup-

posedly supported the exhibit (J.A. 1485a), but petitioner apparently did not think the matter of sufficient importance to do so.

Borg-Warner's contention (Pet. No. 1048, 22–25) that the court of appeals erroneously affirmed the trial court's "missing witness" charge is based on an error of fact. Contrary to petitioner's statement that "Borg-Warner had put in no case" (Pet. No. 1048, 23), Borg-Warner put in a case of its own, by introducing several exhibits (see, *e.g.*, E316) and taking a witness as its own on cross-examination in order to go beyond the scope of direct examination (JA 739). On such a record, the missing witness instruction was entirely proper. *Graves* v. *United States*, 150 U.S. 118.

Similarly without merit are Borg-Warner's accusations of improper conduct by the trial judge and the prosecutor (Pet. No. 1048, 13–14). The court of appeals examined the record with meticulous care and concluded that Judge Rosenberg had behaved with fairness through a long and wearing trial (Pet. App. 22a–23a). As to the prosecutor's closing remarks, the court held that any prejudice was insignificant in light of the trial court's corrective instructions (Pet. App. 29a–30a).

These and other arguments made in the various petitions were raised and exhaustively considered in the court below. To the extent that we have not discussed any argument, the careful and comprehensive opinion of the court of appeals affords an adequate answer.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1047

UNITED STATES OF AMERICA,

Respondent,

—against—

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, JOSEPH J. DECKER and DANIEL J. QUINN,

Petitioners,

and

KOHLER CO., BORG-WARNER CORPORATION and NORMAN R. HELD,

Respondents.

PETITIONERS' REPLY BRIEF

The Government's brief in opposition uniformly fails to confront the substance of the questions presented by Petitioners. Repeated references to the length of the trial, the purported strength of the *prima facie* case, or the anti-trust character of the case do not negate the unresolved decisional conflicts which exist with respect to every issue raised by Petitioners.

The theme of the Government's brief is that the questions presented in this Petition were "correctly rejected" by the Court below under the standards of appellate review "appropriate" in "this type of case."[1] No amount of "antitrust" rhetoric can obscure the fact that this is a *criminal conspiracy case* in which three individuals have been sentenced to the same jail as any other convicted criminal defendant. Higher, not lesser, standards of appellate review are appropriate in reviewing such multi-defendant conspiracy trials.[2]

Antitrust conspiracy trials magnify the dangers inherent in conspiracy prosecutions. Since, contrary to the general rule, proof of an overt act is not essential, guilt or innocence is primarily dependent upon the meaning and intent underlying the words employed by the alleged conspirators and the jury's assessment of the character and credibility of the "conspirators'" testimony. The right to confront each declarant, to corroborate or impeach his testimony and to have the jury dispassionately evaluate such testimony becomes even more essential to the fairness of a "typical antitrust criminal conspiracy case." (G.B. at 12.)

The impairment of each of those rights in this case cannot be eradicated by an assertion that the Government's *prima facie* case was "overwhelming." (*See* Pet. No. 1047, pp. 4-8, 23-26) For example, the case as to Petitioner Decker was far from overwhelming: the Court of Appeals[3] merely found "sufficient" evidence to go to the jury on one of the "four phases." (G.B. at 4n. 3) All Petitioners, more-

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1. BRIEF FOR THE UNITED STATES IN OPPOSITION (hereinafter "G.B."), p. 12-14.

2. *E.g.*, *Dennis* v. *United States*, 384 U.S. 855, 860 (1966); *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947); *Kotteakos* v. *United States*, 328 U.S. 750, 777 (1946).

3. The opinion of the court below, which was not officially reported when the petition was filed, is now reported at 433 F.2d 174.

ever, offered evidence which rebutted every material element of the Government's case and which, if believed, compelled acquittal. (Pet. No. 1047, p. 8)

I. Petitioners Were Denied the Right to Confront Pivotal Witnesses Against Them.

In response to Petitioners' challenge to the multi-faceted denial of their right to confrontation, the Government merely reiterates arguments unsuccessfully made in opposition to the petitions for writs of certiorari in *Bostic* v. *United States*, certiorari granted, No. 5250, O.T. 1970, January 11, 1971 and *O'Neil* v. *Nelson*, 422 F. 2d. 319 (9th Cir. 1970), certiorari granted, No. 336, O.T. 1970, November 9, 1970.

As in *Bostic*, Petitioners challenge the constitutionality of the prosecution's right to rely upon the co-conspirators exception to the hearsay rule to introduce highly incriminating extra-judicial declarations of available, but non-testifying, co-conspirator declarants. As in *O'Neil*, Petitioners question whether the right to confrontation is preserved where the alleged declarant, on cross-examination, denies making, or denies present recollection of whether he made, the out-of-court statement attributed to him.[4] Unlike *Bostic* and *O'Neil*, however, this Petition also raises for review the question whether incriminating out-of-court declarations of non-testifying co-conspirators are immunized from the requirements of the Confrontation Clause merely because they technically may be characterized as non-hear-

4. The Government's attempt to distinguish *O'Neil* from this case is a distinction without substance. (G.B. at 16-17) Incriminating declarations allegedly scribbled on hotel stationery (HCA notes), or purportedly made privately over the telephone or in a hotel room (Pet. No. 1047, p. 16-17; G.B. 17-20), are no less incriminating, nor more inherently reliable, nor less immune to cross-examination than the declaration in question in *O'Neil*.

say evidence. (*Compare* Pet. No. 1047, pp. 12-14 *with* G.B. at 18n. 17)

In *Dutton* v. *Evans*, 400 U.S. 64, 39 U.S.L.W. 4015 (1970) Mr. Justice Marshall, joined by Justices Black, Douglas and Brennan in dissent, stated that the prosecution's use of incriminating extra-judicial declarations of available, non-testifying declarants was "precisely what the Confrontation Clause . . . prevented." 39 U.S.L.W. at 4024. Unlike *Dutton*, however, the unconfronted evidence in this case did not carry with it the "indicia of reliability" which Mr. Justice Stewart, in the prevailing opinion in *Dutton*, found sufficient to permit the admission of evidence without confrontation. The constitutionality of the unfettered application of the co-conspirators exception in criminal cases is squarely presented in this case and should be resolved by this Court.

The remaining rationalizations by the Government for the denial of confrontation in this case are equally without merit:

(a) The denial of such a fundamental right may not be dismissed as harmless beyond a reasonable doubt in this case. Each of the *examples* cited by Petitioners constituted devastatingly incriminating evidence: many of the out-of-court declarations constituted purported price-fixing agreements which alone would have supported conviction of all defendants under the trial court's charge. *See, e.g.*, E168-178 (HCA notes) (Pet. No. 1047, pp. 10-14); J.A. 302a-303a (Bonnett-Quinn conversation) (G.B. at 17); J.A. 190a-191a. The fact that the HCA notes, for example, related only to the "fourth phase" of the conspiracy charged is irrelevant, since the jury's verdict may have been founded upon only one such "phase". As to Petitioner Decker, moreover, "sufficient" evidence existed *only* as to the "fourth phase" to which the HCA notes related. (*See supra* at 2)

(b) Pape was actually available to testify, under the standards established in *Barber* v. *Page*, 390 U.S. 719 (1968), as the trial court's denial of Pape's motion to quash the

Government's trial subpoena necessarily establishes. (See Pet. No. 1047, p. 19n.1) The Government apparently now arrogates unto itself the exclusive right to determine a witness' "availability"—a decision which they would have insulated from the bothersome requirements of the Confrontation Clause. (See G.B. at 18-19). At most, the Government's argument as to Pape's "technical availability" raises an additional issue which this Court should promptly resolve.

II. Petitioners Were Denied the Right to Confrontation and Due Process of Law by the Government's Suppression of Information Material to Their Defense.

The Government's brief ignores both the question of whether disclosure of Pape's grand jury testimony was compelled by the Confrontation Clause under the facts of this case (Pet. 1047, pp. 17-18) and the conflict between the Third Circuit's decision in this case and its own and other Circuits' decisions in other cases. (Pet. 1047, p. 19 n.1, 2)

The Government's attempt to excuse the suppression of Pape's grand jury testimony on the grounds the Petitioners waived their constitutional rights to its disclosure is legally and factually erroneous.[6] The Government's obligation to

5. The obligation to afford defendants the opportunity to confront material witnesses against them may *not* be blithely circumvented by shifting to the defendants themselves the obligation to produce purportedly incriminating witnesses as the Government implies in its brief in opposition. (G.B. at 19n.19) *See Dutton* v. *Evans*, 400 U.S. 74, —, 39 U.S.L.W. 4015, 4023n. 4 (1970) (Marshall, J., dissenting); *Lopez* v. *United States*, 373 U.S. 427, 445 (1963) (Warren, C.J., concurring).

6. Petitioners had never interviewed Pape; in fact, his counsel denied Petitioners' request to do so. *See* Transcript of Oral Argument, May 22, 1970, p. 220. Moreover, contrary to the Government's assertion, Petitioners *did not withdraw* their *request* for the production of all "Brady material": Petitioners by stipulation did withdraw their "motion", while expressly reaffirming their "request" in that stipulation (E164, ¶30(L), and renewed their "request" in court at the beginning of trial (T. 395).

make such a disclosure is not dependent upon a specific request by defendants. *See Giles* v. *Maryland*, 386 U.S. 66, 73 (1967); *Barbee* v. *Warden*, 331 F.2d 842, 845 (4th Cir. 1964); *cf., Johnson* v. *Zerbst*, 304 U.S. 458,464 (1938).

Moreover, petitioners, contrary to the Government's representation herein (G.B. at 20), repeatedly requested in open court the production of grand jury testimony, and "all material helpful or exculpatory," pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioners' initial request for such disclosure at a pre-trial conference was rebuffed by a representation by the prosecutor that there was no "*Brady* material," which disclaimer he then promptly retracted:

> "When you asked me is there anything in the files of the United States that shows the innocence of the defendants I would like to withdraw that answer and stand mute." (Transcript, Hearing on 10 4 68 (hereinafter "H.T.", p. 51)

The trial court denied Petitioners' immediate motion that the prosecution be ordered to make such a disclosure. (H.T. 51) Counsel for the Petitioner then interjected:

> "If it please the Court, I would like to state for the record that under Brady versus Maryland the representative of the United States cannot stand mute. If he has anything on Grand Jury, he is bound to disclose it." (H.T. 52)

The District Court merely commented:

> "Mr. Teitelbaum [counsel for American Standard] what do you want me to do, use a whip on him? He is a lawyer, he is a reputable representative of the Department of Justice. Now, under the circumstances if he stands mute what do you want me to do"?

Mr. Teitelbaum responded:

> "Under the circumstances, I think that the Court ought to force him to disclose it." (H.T. 52)

Grand jury testimony constitutes one of the Government's principal storehouses of exclusive facts and this Court should take this opportunity to clarify:

(a) whether the Government constitutionally may refuse to call an available witness, yet introduce his incriminating out-of-court declarations without disclosing to the defense that the witness contradicted, or failed to adopt, those declarations before the grand jury;

(b) whether the Government is obligated to disclose only grand jury testimony which "on the whole" is exculpatory or is compelled to disclose any material element of a grand jury witness' testimony which is either "exculpatory" or forseeably would assist defendants in preparing or presenting a defense; and

(c) whether, as in this case, the prosecutor may assert the right to stand "mute" in the face of defendants' request in open court for the disclosure of "all material helpful or exculpatory."

III. Petitioners Were Deprived of the Presumption of Innocence by the Trial Court's Charge Questioning the Probative Value of Their Exculpatory Testimony.

The Government concedes the conflict between the Third Circuit's decision in this case and the Second Circuit's decision in *United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32, 39-40 (1970), *opinion modified and rehr. denied*, [1971] Trade Cas. ¶73,405 (1970). In fact, in its own petition for a writ of certiorari in *Pfizer* the Government raises the Second Circuit's contrary ruling as one of the "Reasons for Granting the Writ." (*See* Pet. No. 1286, pp. 24-27) Contrary to the Government's contention in this case Petitioners have not "failed to preserve the issue" due to their failure to object to the charge at trial. (G. B. at 24) No more concrete example of "plain error" affecting substantial rights

within the meaning of F. R. Crim. P. 52(b) could be cited than a charge such as the one in question herein which destroyed the presumption of innocence and impaired Petitioners' constitutional right to proof "beyond a reasonable doubt." (See Pet. No. 1047, pp. 20-22)

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

February 12, 1971

Respectfully submitted,

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